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BY
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BARRISTER-AT-LAW

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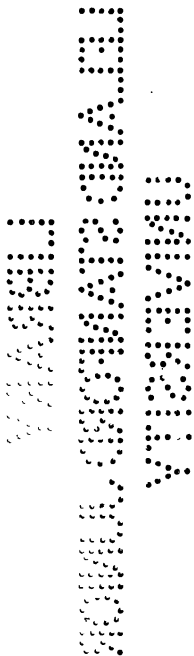
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PREFACE.

THIS book is based upon lectures delivered before the Institute of Bankers of New South Wales, in the winter months of the past few years.

Part I. deals with Elementary Law relating to Personal Property, and is introductory in character; it is intended to fit the Banker, or the Law Student who may be reading law for the first time, to follow the discussion contained in the main part of the book.

Part II. is the body of the book. It contains what I hope will be found a close and reasonably accurate discussion of the relation of Banker and Customer, and of the nature of property in money, cheques, and bank accounts; chapters dealing with the position of banker and customer, in respect of domiciled Bills, and Bills discounted or for collection, and with the effect on the banking contract of the action of Agencies, Branch Banks, and Officers are added.

In dealing with the duty of Banks in respect of the collection and payment of cheques, a great deal of attention has necessarily been paid to recent English decisions, especially to the *Gordon cases*, to the analysis of which a special chapter has been devoted; in the same way, the Victorian case of *Marshall v. Colonial Bank* has been discussed at length in a chapter on Forgeries. It may be that the importance, and the recency of those cases, have pressed themselves upon me, and into the book, somewhat prominently; but I make no excuse for treating at length cases which have created such profound interest where banking law is discussed, and which have led in some States to alterations of the important law

codified in the Bills of Exchange Act. Indeed, a really unfortunate effect of these decisions has been the tendency to diversify by sporadic amendment, law which had, by the adoption of that statute, been rendered practically uniform throughout England, Canada, Australia, New Zealand, and many of the United States of America.

Having spent some of the earlier years of my life as a clerk in the service of a bank, I may claim to have seen banking routine from the practical as well as the legal point of view, and I hope the experience and familiarity with negotiable instruments gained by handling many thousands of them in the way of a banker may have assisted me as a lawyer to handle these topics in a practical and useful manner. I venture, at any rate, to hope, like Sir Frederick Pollock in the introduction to his Law of Torts, that, where an interesting topic has invited expatiation or digression, some practitioner may some day be helped to his case thereby. The contract of Deposit for Safe Custody has been dealt with for the sake of convenience in the introductory part of the book, and used as an illustration of Bailment.

Part III. deals with Securities and Bankruptcy, and, like Part I., is designed for the use of Bankers and Students.

The law relating directly to Bankers is practically the same throughout Australia and New Zealand; and, though the statutes referred to herein are those of New South Wales, except where otherwise expressly mentioned, they are, after all, of minor importance compared with the Common Law which prevails throughout Australia and New Zealand; and further, each statute has its counterpart in each State of Australia and in New Zealand, though not always known by the same name.

Thus, the statutory law, relating to Evidence and

Bankers' Books is in force throughout Australia and New Zealand. So is the Bills of Exchange Act, though in Victoria it forms a part of the Instruments Act. Stamp Duties Acts are much the same in each State, and the Criminal Law and Bankruptcy Acts, where they differ at all, differ in procedure rather than in substance.

The Banks and Bank Holidays Act of New South Wales is represented by the Banks and Currency Act of Victoria, and the Bills of Sale, Liens on Crops and Wool and Stock Mortgages Acts of New South Wales have their counterpart in Victoria in parts of the Instruments Act.

Were it necessary to justify this publication, I should claim that the ordinary text book does not directly show the application of legal principle to the routine work of banking. Even the doctrine of negotiability and its application are, it may be safely asserted, insufficiently understood. Yet some of the largest items in an inventory of the personal property of a modern community would consist in the bank balances, the coin in reserves and in circulation, the cheques and other mercantile paper in course of negotiation or collection.

The amounts owed by Australian Banks to customers in Australia aggregate more than £100,000,000. Debit balances owed to them by their customers amount to somewhat similar figures; coin held, £20,000,000; notes and coin in circulation, about £10,000,000; and the cheques and mercantile paper passing annually through the clearing-houses in Melbourne and Sydney amount to hundreds of millions sterling. The application of elementary principles of law to these huge items of property is but scantily shown in the ordinary text-book, and the ability to trace out the position of the parties to a negotiable instrument which has passed through any unusual course is not common.

Having its origin in a course of lectures, I have no doubt, this book will betray some faults of style, in ex-

pression more suited to the lecture room than the medium of pen and ink; but I found it impossible to eliminate that feature without re-writing the whole work. I can only plead for tolerance of such defects from those to whom the book may be of practical use.

It remains to offer my sincere thanks to friends who have assisted me in the completion of this work. Especially my thanks are due to Mr. Leverrier, of the Bar of New South Wales, and Challis Lecturer on the Law of Status, Civil Obligations, and Crimes, and to Mr. Macansh, of the firm of Fisher and Macansh, whose experience as legal adviser to two Banks in Sydney is very great.

Both these gentlemen have assisted me with advice and revision to an extent that allows me to offer this book to the public with a degree of confidence in the accuracy of my work greater than I could have felt in unaided effort.

To Mr. J. B. Peden, of the New South Wales Bar, Challis Lecturer on the Law of Property, I am also indebted for useful suggestions as to the matter of Part I.

F. A. A. RUSSELL.

Denman Chambers,

Phillip Street, Sydney,

7th May, 1907.

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BANKER & CUSTOMER

PART I.—INTRODUCTORY.

CHAPTER I.

NATURE OF BANKING LAW, AND ITS POSITION IN THE FIELD OF LAW.

THERE is no specific branch of law which can be properly termed the Law of Banking.

The Law of Banking is, however, used as a term to denote that portion of the Law which bears directly upon the rights and duties of bankers, when acting as such, and upon the customers of a bank in respect of their bank accounts, banking operations, and dealings in documents to which a bank is a party. The operations of banks and their customers are so far-reaching that the whole field of law would require to be traversed in order to bring under review the application of legal principle to the multifarious questions arising in the course of banking business. Ordinary banking business, however, has a certain well-understood compass, within which lies the daily routine work of bankers ; this consists chiefly in the management of customers' accounts, the payment of their cheques by exchange or by cash, the collection of documents for them, the arrangement of credit, the issue of notes, and transactions with other banks, branches, and agents, in furtherance of these functions ; and the law which is applicable to all these everyday operations is

CHAP. I.

Use of the
term "Law
of Banking."

CHAP. I. capable of being explained and its operation shown in volumes of moderate compass: it is to the explanation of this body of law that the works of text books writers on banking law are chiefly devoted.

The whole body of Law which applies within the territorial limits of a State is called by jurists Municipal Law as opposed to International Law.

Branches of law.

This so-called Municipal Law is subdivided for convenience into various branches, the most important of which, from the point of view of a student of Commercial Law, are the Law of Contracts, the Law of Property, and the Law of Torts; torts being the name given by lawyers to wrongs (not necessarily crimes) which give rise to actions in the civil courts.

The Criminal Law, too, has some provisions which bear directly on banking and commercial law; and indirectly it is of the greatest importance in safeguarding business men and the transaction of business. It should be borne in mind that the departments of law are not self-complete, but overlap and lead one into another, so that a complete study of any one branch of law would take the enquirer into most, if not all, the other branches. And if a topic such as banking is to be treated of in its legal aspect, it will be necessary to draw from many branches of law to properly review it. Subject to this, Banking Law may be considered as a part of the Law of Property.

Distinction between Real and Personal Property.

The Law of Property is sub-divided into two branches, namely, the Law of Real and the Law of Personal Property; this distinction is natural and necessary, for real property is different in kind from all other forms of property; it comprises land and things in the nature of land, as houses built upon or mines dug in it, it includes also the title deeds or muniments which relate thereto. Property which is not real estate is in nature

usually moveable and destructible, often perishable, and a great deal of it such as crops, foodstuffs, clothing, &c., is consumed by use. Of necessity, therefore, the law offers different remedies to the owners of realty and personalty. The dispossessed owner of realty can be replaced in possession of his land; but in the case of personalty it may be quite useless to attempt to regain possession, and a remedy by way of damages or compensation is indicated. There are also historical reasons for a wide difference between the two branches of the Law of Property. In the case of real property the present law is directly derived from the rules of feudal tenure, and though the tendency of recent amendments of this branch of law has been to eliminate the characteristics of mediæval feudalism, still the ownership, holding, or tenure of land, as it is more accurately called, remains Feudal in character, and many details of the existing law can only be fully explained and understood in the light of Feudal history.

The Law of Real Property is then a thing by itself, distinct in character from the law which governs other classes of property.

Having noticed this distinction, the student of banking law may defer for the present any consideration of real property law. It has its importance in connection with bank premises, and, what is of vital interest to bankers, in connection with securities; but in a study of the business of the banking room and of the every day dealings with customers it may be disregarded.

The term personal property is far wider than real property; it embraces all that is not "real," as cattle, furniture, plate, ships, money, mercantile documents, as well as such things as debts, shares in companies, debentures, Government stock, and the like. Leases of real estate, although they really give the tenant an interest in

What is personal property?

| | |
|------------------------------------|--|
| CHAP. I. | land, are considered to be part of his personal estate; they were inapt for inclusion under the feudal rules of tenure, but savoured of the land, and were therefore termed <i>chattels real</i> ; they are treated of in works on Real Property. Other kinds of personal property |
| Cf. page 10. | were termed <i>chattels personal</i> and it is with these we have now to deal; chattels real having been mentioned simply to complete the classification. Now banking accounts, coin, notes, cheques, bills, fixed deposits, letters of credit, &c., are all chattels personal |
| Its sources. | and are governed by the principles of the law of personal property. This law, unlike that of real property, is heterogeneous, derived from various sources and connected with different periods of history. Thus the modern |
| Statute. | law with regard to bankrupt debtors, public companies, policies of insurance, copyright, &c., is to be found mainly in Acts of Parliament which were enacted as the modern developments of business required. Then, the law relating to bills of exchange is derived from the Law Merchant; it has recently been codified and enacted in The Bills of Exchange Act. That Act was intended to be a codification, and the law which it embodies had already been engrafted into English mercantile law from customs which prevailed with binding force amongst |
| Law merchant. | merchants. Besides all this, there was always the common law of England relating to personalty; this applied, and still applies, to all forms of personalty except where otherwise provided by statute or where legal recognition of other rules was gained by the force of universal custom as in the case of the law merchant. This, when it occurred, was not so much an alteration of the common law as an addition to it of statute and customary law, designed to meet cases unknown in the simpler composition of society and industry of feudal times. |
| Common Law. | |
| Common Law in relation to banking. | In early days the most important part of a man's personal estate consisted of his herds and flocks, and |

thus the term chattel (the Norman-French equivalent of cattle) came to be a generic term, embracing all classes of personalty. In those days, bills of exchange and policies of insurance were unknown to the law in England ; debts, however, were known then as now, and it is perhaps due to this fact that there has been so little legislation on the subject of banks and bank accounts, for it has been decided that the balances due by banks to their customers on current account are simple contract debts and nothing more, and the relationship is the same even though the position be reversed. It follows, thereupon, that the relationship of banker and customer is governed chiefly by the common law. CHAP. I.

The volume of banking business is now so huge, and its growth so modern, that one might expect to find a quantity of recent statute law regulating the subject, and there are some enactments dealing expressly with banking, but all things considered they are remarkably few. The chief of these statutes are :—

- (1) The Banks and Bank Holidays Act, which regulates, among other things, the publication of periodic returns.
- (2) The enactments relating to evidence of banking accounts and bankers' books.
- (3) The part of the Bills of Exchange Act dealing with crossed cheques.

From the foregoing the student should gather, that no express body of law especially designed to regulate transactions with banks can be discovered or pointed out as the law of banking, that the law of banking may be regarded as a part of the law of personal property ; and, that it is to be gathered from various sources, the chief of which are :—

CHAP. I.

Sources of
banking law.

- (a) The principles of the common law relating especially to the possession, delivery, and ownership of chattels, to debts, and to simple contracts.
- (b) Parts of the statute law directly applicable to banks.
- (c) Statute law which necessarily affects and regulates the conduct of bankers, though not applying exclusively to them: for example, the provisions of the Bills of Exchange Act relating to the duties of the holder of a bill of exchange.

The student who is reading law for the first time is very often bothered by the use of the terms "common law" and "equity," and to such the following definitions may be of use:—

Common
Law.

Common Law is not statute law ;
nor equity ;
nor civil or Roman law ;

but is,—

- (a) That portion of the present or former law of England which does not rest upon statute ;
- (b) In a second sense common law consists of that portion of law which is administered in the Common Law Courts as opposed to those of Equity, Probate, Divorce and Admiralty ;
- (c) In a third sense, when the term is used by way of contrast to the civil or Roman law, it may include equity.

Equity.

Equity is a body of law administered by the Courts of Equity. It is distinguishable from law in the way it is applied rather than in its spirit. It was developed by the Chancellors of England with the aid of Roman law and common law principles before and during the reigns of the Tudor sovereigns. In times when the common law was

administered in a cramped and highly technical fashion it was used to supplement the common law, and to provide remedies for grievances which appeared to be beyond its reach. The Chancellors were trained ecclesiastics, well qualified to enquire into matters of conscience, and their courts acquired an exclusive jurisdiction in matters relating to trusts and wills; their decrees were directed personally to the litigants before the court, enjoining upon them their duties in a way that those addressed might not ignore; and in the offices attached to their courts were officers and a system capable of analysing accounts in a manner which Common Law Courts could not formerly have done, thus the jurisdiction developed and acquired exclusive control of other matters besides trusts, such as mortgages, and a practically exclusive jurisdiction in the case of partnerships and other questions involving accounts.

Courts of Equity are historically the direct representatives of the Chancellor of England of former days when serving in his legal capacity.

In a sense Equity includes some portions of the statute law—especially such statutes as are directed to controlling the practice of the Equity Courts, and also, those statutes which relate to matters almost exclusively dealt with in Courts of Equity: for instance, Trustee Acts.

Changes made by the Judicature Act.—In England and all the Australian States, except New South Wales and Tasmania, a reform in legal procedure has been introduced by the Judicature Acts. The most important enactment of this statute is that “*in every civil cause or matter commenced in the High Court of Justice, Law and Equity shall be administered concurrently, and that whenever there is a conflict between the rules of Common Law and those of Equity, the rules of Equity shall prevail.*”

CHAP. I.

Common
Law and
Equity
under the
Judicature
Act.

The Judicature Act in England abolished the old courts of King's Bench, Common Pleas, Exchequer, and of Chancery, creating a High Court of Justice, to which the powers of those courts were transferred. Nevertheless the High Court is subdivided into certain Divisions, as the King's Bench, Chancery, and Probate Divisions, and suits are commenced in one or other of these divisions, according to the subject matter; and certain classes of actions are in practice confined for reasons of convenience respectively to the various Divisions: Common Law Actions to the King's Bench Division, and Equity suits to the Chancery Division; thus the old distinctions remain very largely in practice. But in view of the fusion of Law and Equity indicated in the passage italicised, it is no longer correct where the Judicature Act, or similar law is in force, to refer to the exclusive jurisdiction of the Courts of Chancery or Equity. All the judges of the High Court have the same jurisdiction; and it is clear that any judge may, if he chooses, when an action has been brought in the wrong Division,* retain the action and exercise the jurisdiction.

Yet, notwithstanding the fusion of Law and Equity, which has, by the Judicature Acts, been in a great measure effected, the distinction between the two systems remains substantial and real. The differences between legal and equitable estates and interests and principles continue to exist, and to produce most important results; so that if we were to cease to indicate the contrast by the terms "legal" and "equitable," we should have to invent others for the purpose.

*This admission that the Division may be the wrong one in which to bring the action, coupled with the assertion of the right to exercise the jurisdiction, aptly illustrates the practical effect of the Statute.

CHAPTER II.

TERMINOLOGY; CHATTELS; PROPERTY AND POSSESSION; TROVER; BAILMENT; LIEN.

SINCE an elementary knowledge, at least, of the Law of Personal Property is essential to a study of Banking Law, it is necessary that a student should learn the meaning of terms that are in constant use. Some of these come from the old Norman-French, and are out of date or are tending to pass out of use; but there are many which cannot be discarded while the law respecting them remains in force and important, unless equally good terms equally clear in meaning can be substituted for them. It is largely because of the definiteness of their meaning that many old-fashioned expressions continue in the vocabulary of law. Lawyers are used to them. Their meanings and attributes have been closely scrutinised for a long period of time, and thus been rendered very certain.

CHAP. II.

It has already been pointed out that personal property can be subdivided into

- (1) Chattels real;
- (2) Chattels personal.

It is necessary, however, to bear in mind another equally important subdivision, and understand clearly what is comprised in each branch, viz:—

- (a) Choses in possession;
- (b) Choses in action.

These two groups comprise the whole of things personal; the one is the antithesis of the other.

CHAP. II.

Cf. *post*, p.

Chose is simply the old Norman-French word for thing, and *choses in possession* are those pieces of personal property which are in the possession of some one ; and the possession of goods is not limited to actual physical grasp—the law extends the term to cover cases where goods are kept in a residence, shop, or warehouse, or on a man's behalf by his servants, in which cases the master of the house, store, or servants, as the case may be, has in the eye of the law possession of the goods so kept. All pure personalty which is not in possession consists of *choses in action* ; but in its primary sense, or at any rate in the sense in which it is most used, the term is peculiarly applicable to debts : it is not possible to have in any sense physical control of a debt ; and if it be necessary to enforce payment this must be done by an action, hence the term. Claims for damages are also *choses in action*, so are shares in joint stock companies, policies of insurance, &c., &c.

Meaning of
chattel.

From what has gone before it would seem to follow that the term *chattel personal* is wider than *chose in action*, and includes it. So it does, in the way in which it has been used, and it has been held that the word *chattel* used in a will—in a bequest of personal property—was wide enough to include a debt. But where the word *chattel* is used by itself and not in contradistinction to *chattels real*, it is usually intended to refer to *choses in possession* merely ; it is taken to be synonymous with goods, and as referring to tangible things capable of physical possession.

Property and Possession.—It is necessary to distinguish these terms. Property consists in the right to possess and enjoy goods to the exclusion of all others, and may be divorced for a time from actual possession, or even from constructive possession—in short, the ownership of goods may be in A, while possession is in B. Mere

possession, too, is a thing worth considering apart from ownership, because the possessor of goods is clothed by law with valuable rights irrespective of ownership, and can legally defend his possession or even maintain an action of conversion against persons having no better title than himself, that is, against all the world except the true owner or persons claiming through him. CHAP. II.

These valuable legal rights which attach to mere possession are well exemplified by the old leading case of the chimney-sweep and the jewel. A chimney-sweep having found a jewel took it to a jeweller's shop to find out its value, but was tricked out of his possession and paid a few pence for it; it was held he could successfully sue the jeweller for wrongful conversion, and he obtained judgment for damages equal to the full market price of a jewel of the first water of the size of the one in question, the jewel itself not being forthcoming. Of course the true owner, had he turned up, might have maintained a similar action against the chimney-sweep, unless, that is, the chimney-sweep at once honestly handed over the jewel, or the cash he received in its place to such owner. Armory v. Delamirie,
1 Str. 504
Sm. L. C.

In the case of *Bridges v. Hawksworth*, a parcel of bank notes was dropped on the floor in the part of a shop frequented by customers. Being dropped in such a place in business hours, they were, it seems, not in any one's custody or control at all. *Bridges* (the plaintiff in the cause) noticed the parcel, and picked it up, and thereby acquired possession, both in fact and in law, and a limited right to possession, good against everyone not having a better title. The plaintiff then delivered the parcel to Hawksworth (the shopkeeper) for the purpose of ascertaining the true owner, if possible, and restoring the notes to him, but (so the jury found) without any purpose of affecting the relative rights of the plaintiff and the defendant, failing discovery of the true Finding of
bank notes.
1851, 21
L.J.Q.B. 75.

CHAP. II. owner. Thus the defendant had possession, but only as a bailee from the plaintiff for a limited purpose. Advertisement failed to discover the true owner; after three years the plaintiff claimed the notes, but the defendant refused to hand them over. The plaintiff thereupon brought this action. It was held he was the actual finder, and as such had the better right.

A case not differing greatly from the above arose in Massachusetts, where it has been held that when a customer voluntarily lays down his pocket book on a table in a shop or a desk in a counting house, and forgets to take it up as he goes away, possession and a limited right to possess are acquired by the shopkeeper or the banker, and the first person who takes up the pocket-book is not a real finder at all.

In such a case the open voluntary act of placing the object there has the effect of placing it within the same general protection as other things in the same room. This general protection is due to the fact that the owner of furniture or effects in a house occupied by himself is credited with a general intention to possess, and guard, if necessary, all the things in his house, or even in his grounds, such as a garden seat, and that such a person usually maintains an actual possession, as well as may be, having regard to his own circumstances and the nature of his property.

Possession, it may be pointed out, is of various kinds, and the word itself is equivocal. It may be used to mean physical control or actual detention of the things possessed, or it may mean legal possession, that is, the state of being a possessor in the eye of the law. Used in such a way it would include physical control, also cases such as legal possession through one's servant or agent. Then there is the term "right to possess," which has a still wider meaning, so that it may include both

physical control and legal possession, and, in addition, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed.

In elementary text-books, it is usual to describe possession as being either actual or constructive: the terms, are, however, somewhat ambiguous. Mr. Pollock says: "Right to possess, when separated from possession, is often called 'constructive possession.' The correct use of the term would seem to be co-extensive with and limited to those cases where a person, entitled to possess, is (or was) allowed the same remedies as if he had really been in possession. But it is also sometimes specially applied to the cases where the legal possession is with one person, and the custody with his servant, or some other person for the time being in a like position, and sometimes it is extended to other cases where legal possession is separated from detention. Actual possession as opposed to constructive possession is in the same way an ambiguous term. It is most commonly used to signify physical control with or without possession in law. It has however been held to include purely legal possession."

Delivery.—Closely akin to the subject of possession is that of delivery. Delivery is the term given to the voluntary transfer of possession which accompanies a gift, and is indeed necessary to its validity unless the gift be by deed under seal. Delivery is also necessary to complete a bargain and sale of goods where the value is £10 or upwards, and the conditions of the Statute of Frauds have not been satisfied in some other way, *e.g.*, by putting the contract in writing or clinching the bargain by part acceptance or part payment. In the case of small goods, manual delivery is easy enough, and is the rule rather than the exception; frequently, however, in the case of bulky goods manual delivery is not possible, and it may

CHAP. II. easily be a question of controversy whether delivery of goods has been effected so as to change the legal possession of them. This point the text-books usually illustrate by the case of goods in a warehouse, where a handing over the key with the intention of changing possession is sufficient to constitute delivery. Delivery of this kind is sometimes spoken of as *symbolic delivery*, but Mr. Pollock discountenances the use of this phrase; going thoroughly into the matter he comes to a practical English conclusion that such a delivery is good, because it is such a transfer of control in fact as the nature of the case admits, and as will practically suffice for causing the new possessor to be recognised as such; he does not think any validity is obtained in such a case by support from any theory of symbols, and appears to take the view that such a notion is repugnant to our law.

Partial delivery.—Where goods are so bulky that manual delivery is impossible, or immediate manual delivery inconvenient, and it is not practicable to make delivery by handing over a key or other symbol of control, the device of a partial delivery is sometimes resorted to, and it would seem to be good law that the delivery of a part may be a delivery of the whole if it is so intended, but not otherwise, and the burden of proving the intention would be upon the party who asserted delivery had taken place.

As to the remaining bulk of goods in respect of which manual delivery had not taken place, this would be a particular instance of change of possession by a change of the character in which the goods are held by the actual custodian. Generally, the actual custodian would, upon a constructive delivery of this kind, become a bailee for the transferee.

So much for possession and delivery. Now the ownership or property in goods is said to draw with it the right to possession, and when a man becomes in law

the owner of a chattel he may by taking the necessary steps bring, or as lawyers say *reduce* it into possession. CHAP. II.

Instances usually given in the text-books of property being separated from possession come under the heads of Trover, Bailment, and Lien.

Trover.—This is a short name for the action of trover and conversion; it now lies at the suit of an owner to recover damages for the wrongful conversion of goods by unlawful taking, withholding possession, sale, or otherwise; to maintain such an action the plaintiff must have a right to the immediate possession, and mere legal possession is sufficient to support this action against a wrongdoer: this was the action used by the chimney-sweep in his case against the jeweller. You will notice this form of action does not produce a decision as to who is the real owner. It merely decides between two parties which has the better right. See *Post*, Cap. XIII.

Bailment.—This term comprises a large class of contracts, all of them being instances where goods are delivered over, not so as to alienate them from the owner, but for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the bailment; the class comprises gratuitous loans of a chattel, deposits for safe custody, the entrusting of goods to an artificer that work may be done upon them, *e.g.*, a coat sent for repair, or picture to be framed, and it includes, too, the cases of goods pawned or let out upon hire. In all cases the property remains in the bailor; possession is in the bailee. Either party may maintain an action for trover and conversion against a third party, except that in cases where the bailee has a right to exclude the bailor from immediate possession, then the bailee alone has, in general, the right to sue; such cases would be those of the pawnee or hirer of

CHAP. II. goods. If, on the other hand, in any of these cases the bailee should do something with the goods inconsistent with his contract, then the bailor becomes entitled to immediate possession and can sue the bailee or third parties.

Bailment with a Banker for safe custody.—An instance of bailment very usual with bankers is the receipt and care of valuables deposited with a bank by its customers for safe custody. In all cases of bailment it becomes the duty of the bailee to take care of the thing bailed; but the degree of care which the law demands differs in cases where the bailment is gratuitous, from that required in cases where the bailee receives a reward or commission.

Safe custody,
(a) gratuitous.

Giblin v.
McMullen,
1869, L. R.
2 P. C. 317.

Generally speaking, in cases of gratuitous bailment, it is sufficient if the bailee exercise the care that would be used by an ordinary prudent man in the management of his own business. So, in two such cases where the bank had exercised proper care but nevertheless the valuables deposited had been stolen by the bank's own officers, the bank was held not to be liable for the loss of the securities; and in one of these cases, where the thief was a teller who had always borne a good character, it was held that nothing short of knowledge or reasonable grounds of suspicion by the bank that the teller was unfit to be appointed or retained would have rendered the bank liable.

(b) For reward.

*In re United
Service Co.,
Johnston's
claim, 1870,
6 Ch. 212.*

But in a case where valuable certificates had been deposited for safe keeping, and an arrangement made that the bank should collect the dividends for a commission, and when it happened that the manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares and forged the name of the owner to the transfer, it was held that the banking company was a bailee for reward

of the certificates, and had been guilty of culpable negligence in the keeping of them. CHAP. II.

In cases where the bank has received a locked box, or sealed parcel, and has no access to the contents and nothing to do in respect of the deposit beyond safe-keeping it, and makes no charge nor gets any direct benefit, those conditions are usually understood as constituting gratuitous bailment. When service is gratuitous. Cf. Grant, p. 191, Langtry v. Union Bk.

But if the bank performs any other banking service, such as detaching coupons from Debentures deposited, and collecting them for credit of a customer's account, for a small commission, as in the case referred to above, that is not a gratuitous bailment. And, if such a service were performed without any direct charge, the case would not strictly speaking be one of gratuitous bailment, for the right given to the bank to receive the proceeds of the coupons would be consideration moving from the customer sufficient to destroy in point of law the idea of gratuitous service. When not.

Moreover, the practice of receiving things for safe custody on the part of banks has become so usual, that lawyers and bankers have doubted whether any ordinary deposit of valuables with a bank for safe custody can properly be termed gratuitous. To sustain this position it is urged that all banks customarily do give such facilities to their customers. A customer, therefore, by virtue of becoming such is entitled to the facilities offered by the bank, and, if he avail himself of the opportunity, the service rendered is no more gratuitous than the collection of an instrument on which no exchange may be chargeable, but is in fact founded on the same consideration, viz., the keeping of his account by the customer with that bank. A doubt raised.

Legal decision, however, has not gone so far and it is generally conceded that a banker's general lien does not extend over documents deposited for safe custody upon

CHAP. II. the ground that any such valuables are not held by him in his capacity as banker.

Lien.—This is the name given to the right of a person in possession of the goods of another to retain possession of them until a debt due to him has been satisfied.

Liens are *particular* or *general*.

Particular where there is a right to retain a thing for some charge or claim growing out of or connected with the particular thing.

General where there is a right to retain a thing or things, not only for such charges and claims, but also for a general balance of accounts between the parties in respect of other dealings between them of a like kind.

Every workman to whom a chattel has been delivered by the owner to be mended, repaired, or altered for reward and who has bestowed his labour upon it has a lien upon the chattel for his charges. Thus the artificer to whom goods have been delivered to be worked up, the shipwright to whom a vessel has been delivered to be repaired, the horsebreaker or trainer, by whose skill a horse is trained or rendered manageable, have each a lien for their proper charge; but such lien may be prevented from arising by express or implied contract between the parties. The Common Law also gives to carriers and innkeepers a particular lien over the goods in their care in the way of business, and the innkeeper's claim on goods extends to the amount of his guest's bill.

Particular liens are favoured in law, but a general lien having a tendency to prefer one creditor above another is taken strictly.

A general lien in respect of a general balance of debt will arise by express contract, and is also implied by custom in certain trades, notably in cases of wharfin-gers and bankers. A banker's lien arises, it may be

noticed, in respect of pure banking business ; it will not CHAP. II.
arise over goods or securities that have been left with a But see
banker upon an express and gratuitous contract for supra, p. 11.
safe custody simply. A lien is lost by giving up possession or by taking security for payment.

CHAPTER III.

ALIENATION OF PERSONAL PROPERTY.

CHAP. III. **LAWYERS** use the term *alienation* to denote the transfer of ownership of property. The expression, transfer of property, would be ambiguous in many ways and liable to be frequently confused with mere delivery of possession.

If we put upon one side the change of ownership under a will, or upon intestacy, and deal only with transfers between living persons, or, as lawyers term it, the alienation of property *inter vivos* the subject may be subdivided into (a) voluntary and (b) involuntary alienation.

Involuntary alienation occurs where a man's goods are taken to satisfy a judgment debt under a writ of execution, or by distraint and sale (*e.g.*, for rent), or when they are sequestered upon bankruptcy or where a debt is garnisheed. Bankruptcy is the subject of a later chapter; the other forms of involuntary alienation are not of direct interest in mercantile law.

The three principal modes of voluntary alienation of things in possession are—

- (1) By gift and delivery.
- (2) By deed.
- (3) By sale.

1. **With regard to gift and delivery.**—In order that the property may pass, delivery must be made; otherwise, if there is no consideration and no deed, words of donation, even though assented to by the donee, will

not of themselves effect a transfer. If, however, the giver declares that he retains possession in trust for the donee, equity will enforce the trust. If you have read the previous chapter, you will not require any information now as to what constitutes delivery. CHAP. III.

2. **Alienation by Deed.**—To the solemnity which accompanies such a formal document the law attaches very great importance. So that a deed is of itself sufficient to pass the property in goods without delivery (*i.e.*, of the goods) and without consideration. To be effective a deed requires to be signed, sealed, and delivered; its peculiar efficacy appears to be due to the seals rather than to the signatures. After it has been *signed* and *sealed* it becomes a complete document; after it is *delivered* it becomes operative.

3. **Alienation by Sale.**—At Common Law the property in goods passes to the purchaser as soon as a valid bargain and sale is made; and for this all that is required is the mutual assent of the parties to the contract. As soon as it can be shown by any evidence, verbal or written, that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price the contract is completely established and binding on both parties, and it matters not that there has been no payment or tender on the one hand, nor delivery nor tender on the other; though acts of this kind may be of great use in proving the rights of parties. At Common Law.

But the contract of sale may not amount to a bargain and sale; it may be merely an agreement to sell sometimes spoken of as an executory contract of sale; and in such a case the prior fulfilment of the condition, it may be prior payment, it may be delivery, it may be some other condition, is essential, and on the fulfilment of the condition property passes, even though delivery may not have been made.

CHAP. III.

Usually, if a given weight or measure is sold out of a larger quantity, the property will not pass until the goods sold have been separated by weight or measure and will pass then.

If no price be named, the contract is to sell at a reasonable price.

By the
Statute of
Frauds.

If the goods sold are in value £10 or over, the requisites are laid down by the 17th Section of the Statute of Frauds, which applies to all such sales and enacts as follows :—

“No contract for the sale of any goods, wares, and merchandise for the price of £10 sterling or upwards shall be allowed to be good except

“(1) The buyer shall accept part of the goods so sold and actually receive the same ; or

“(2) Give something in earnest to bind the bargain ; or

“(3) In part payment ; or

“(4) That some note or memorandum in writing of the said bargain be made and signed by the parties or their agents thereunto lawfully authorised.”

By a more recent statute, it is provided that the above enactment shall extend to all contracts for the sale of goods to the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time. This later Statute is known as Lord Tenterden's Act. Both the Statute of Frauds and Lord Tenterden's Act are in force in N.S.W. In England they have both been repealed, but the law first enacted by them is reproduced in the Sales of Goods Act, 1893. And the same course has been followed—1895-1896—in all the States of Australia (except N.S.W.) and N.Z.

Alienation of choses in action.—The doctrine of CHAP. III.

the Common Law is that choses in action are not assignable. This is said to be due to the fact that debts constituted the primary and principal class of chose in action, and that in early times our forefathers did not look upon choses in action as valuable assets which might be dealt in with advantage like other kinds of goods, but as rights of action simply, and that in the simplicity of those times it was thought that to allow the transfer of rights of action would be an improper encouragement to litigation.

The restriction is one arising out of the history of our Common Law. Nowadays its chief practical effect is to make transfers of debts a little difficult and cumbersome, and not to prevent them altogether; for Equity has always recognised such transfers, and they can be made effective at law by authority to sue in his name, granted by the assignor to the assignee. Thus, when a man is assignee of a debt and finds it necessary to bring an action at law to enforce his right, he is forced to borrow the name of the party to whom the debt at first was owed, and, though himself the real plaintiff, to sue under that name. The authority to sue need not be in writing. As civilisation progressed and forms of property became more refined and complicated, the class of property known as choses in action extended very much and was made to embrace all such new forms of property as were neither movable goods nor real estate, *e.g.*, negotiable paper, shares in companies, and policies of insurance.

Nevertheless, the old doctrine that choses in action are not assignable at Common Law remained, and in the lawyer's classification of ideas this remains as a general rule, modified in the case of special kinds of choses in action by the influence of customary law or express statutes. Thus, bills of exchange are transferable by indorsement, or if payable to bearer, by delivery merely,

CHAP. III. by the law merchant which has been engrafted upon our legal system. Promissory notes have been thrown into the same class by Statute Law. Bills of lading are transferable by indorsement in the same way as bills of exchange payable to order, but the effect of such a transfer is different. The negotiation of a bill of exchange transfers personal rights, spoken of by lawyers as rights *in personam*; the indorsement of a bill of lading assigns the bill of lading and gives a right to the goods; such a transaction, therefore, transfers what lawyers call rights *in rem*. At Common Law (based on the Law Merchant), the indorsement of a bill of lading did nothing more; but in England and in all the Australian States and New Zealand, since the adoption of the English Act, 18 and 19 Vic. c. 111, the assignee of a bill of lading now takes "all rights of suit" and "all liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself."

Bills of
lading.

Policies of Life, of Fire, and of Marine Insurance are all transferable in appropriate ways; and, practically, nearly every kind of chose in action is in effect transferable, if only the appropriate legal method be used. Moreover, under the Judicature Acts, the assignee of any debt or legal chose in action obtains all legal rights and legal and other remedies; but

- (1) the assignee takes subject to equities;
- (2) the assignment must be absolute and not by way of charge;
- (3) and must be in writing signed by the assignee;
- (4) and express notice in writing must be given to the party to be charged, and the assignee's title dates from notice.

Both shares in public companies and stock are held to be choses in action, and therefore a sale of them is

not a sale of goods within the 17th Section of the Statute of Frauds. The transfer of this kind of property is usually effected by a short form of transfer provided for by the regulations of the company. When a transfer is effected it is entered upon the company's register, and such entry is *prima facie* evidence of ownership. CHAP. III.

A list may be added of special kinds of property which have some peculiar feature affecting, and in some cases preventing, transfer. An obvious instance is the case of return tickets for passages by steam or rail, which are usually granted on the express condition that they shall not be transferable. Shares in public companies are not to be acquired by purchase by the company whose shares they are, even though power to buy up its own shares were taken by the company in its Articles. Nor, in the best opinion, if the power were included in the Memorandum of Association. Special forms of property.

A British ship, and the shares in it, constitute a peculiar kind of property. A British ship is divided into sixty-four shares, and an individual may own, and be registered as owner of, the whole or any integral number of shares of a ship; but cannot be registered as owner of fractional parts of a share. Thus a man may be registered as owner of one-fourth of a ship, that is, sixteen shares, or one-eighth, or a sixty-fourth; but could not be registered by himself as owner of one-third part, for that would be twenty-one-and-a-third shares, and thus involve fractional parts. But joint owners can be registered. Also one may hold shares in a ship as trustee, but no notice of the trust may be entered upon the register. The transfer of a British ship or a share in it is to be by bill of sale made out in a statutory form, and accompanied by a declaration stating the transferee's qualification to own a British ship; these

CHAP. III. documents are produced to the registrar of the port where the ship is registered, who thereupon enters in the register book the name of the transferee as owner of the ship or share, and indorses on the bill of sale the fact of that entry having been made. No alien can be registered as an owner of a British ship nor of a share in it.

This law is found in the Merchant Shipping Act, 1894, an Imperial Statute applying throughout Australia, New Zealand, and other British possessions.

Patents and
copyrights,
&c.

Another species of property which presents special features is that coming under the group of copyrights and patents. You will remember from your reading of history the trouble which arose with regard to the granting of monopolies in the reign of James I. During the Tudor *régime* and during James' reign the Crown had abused its rights with regard to the granting of patents and licenses; and by reason of monopolies granted to private individuals dealing in such common commodities as salt and pepper, the public were unfairly and heavily taxed. To do away with this exploitation of the private citizen the Commons succeeded in passing the Statute of Monopolies, which swept away the whole system, and laid down that a patent should not be valid unless granted in respect of some *new* and useful invention. Such a patent by that statute must be granted to "the true and first inventor and inventors." It is upon these provisions of the Statute of Monopolies that the modern law of patents is founded.

Nature of
copyright.

Copyright is the exclusive right of multiplying copies of an original work or composition, and consequently preventing others from so doing. The right does not exist at Common Law, but depends upon statute.

But there is at Common Law, in the author of unpublished matter, an exclusive right to first publication, and to prevent others from publishing.

Prior to Federation, all the States of Australia had their own Copyright and Patents Acts, and many valuable rights acquired under these are still in force and are governed by the old laws. It is sufficient to say that any such rights are very similar to those described below; but the Commonwealth Acts are somewhat more beneficial for authors, designers, patentees, &c.

Commonwealth Legislation on Patents and Copyright.—Upon Federation the right to make laws under these headings were transferred to the Commonwealth; but the rights, which have already arisen in any State in respect of any Patent or Copyright, are preserved and governed by State law which will gradually become obsolete. As it is, the administration of these Acts has already been taken over by the Commonwealth authorities; and the Commissioner of Patents and Registrar of Copyrights are Commonwealth officers, having, amongst other duties, the care of the records of rights now existing under the old State Laws as well as the new rights which are daily created under new laws.

The new laws applying throughout the Commonwealth are found in the *Patents Act*, 1903, and the *Copyright Act*, 1905.

Patents are obtainable by the actual inventor or his assignee or agent, or the legal representative of an inventor or his assignee or, if the actual inventor or his representative is not in the Commonwealth, by a person to whom the invention has been communicated by the actual inventor, his legal representative or assignee.

With the application a specification of the invention is lodged, and protection is granted from the moment of application. An examiner looks into the details of the specification and reports whether it is sufficient, whether the invention is novel, and whether it infringes any

CHAP. III. existing patent or prior application. The Commissioner acts upon the examiner's report, but the applicant may appeal. Provision is made for advertisement of the specification so that parties who might be injured by the grant of a patent get the opportunity of opposing the grant. To be successful, opposition must be based on certain legal grounds, the chief of which are, that the invention is already in use, or infringes another patent or that the applicant has no right.

If the Commissioner decides in favour of the grant, he causes a patent to be sealed with the seal of the Patent Office. It is dated and sealed as from the date of the application, and takes effect throughout the Commonwealth, unless, in some special case, a particular State is expressly excepted. The patent endures for fourteen years subject to payment of a renewal fee at the end of seven years, but may be extended seven years, and in exceptional cases for longer periods upon application to the Court.

It will be observed that prior to application, and while application is pending, the actual inventor or his legal representative can alienate and assign their rights in respect of this invention. When the Letters Patent are granted, they can be assigned to the Commonwealth and can be bought up by the Commonwealth, even against the will of the patentee; or the State rights can be bought up by a State.

The Letters Patent, or more shortly, The Patent, when issued is in the form of a grant to the patentee of "our special license full power sole privilege and authority that the said patentee by himself his agents or licensees and no others may at all times hereafter during the term . . . make use exercise and vend the said invention within the Commonwealth, &c."

Sometimes the patentee or licensee is a manufacturer who makes use of the patent only in his own

business. In other cases, if the patent has any market value, the patentee derives his profit from the granting of a license or licenses which may be for fixed sums or royalties; and the patent is completely transferable by indorsement in a prescribed form, in which case the assignee becomes the patentee. CHAP. III.

Copyright.—The author of a book is the first owner of copyright in it; the term Book is for the purposes of the Copyright Act very wide, and includes pamphlets, maps, sheets of music, and diagrams, &c. Copyright subsists in every book printed from type, &c., set up in Australia and published in Australia before or at the same time as its publication elsewhere; it begins with the first publication of the book and endures for forty-two years or for the life of the author and seven years after whichever shall last the longer (and the same time is allowed to performing and lecturing rights); it includes the exclusive right to make copies, to abridge or translate, to throw it from one form into another—as from a drama to a novel, or *vice versâ*.

The copyright in a book, the performing right in a musical or dramatic work, and the lecturing right in a lecture are all personal property and capable of assignment and of transmission by operation of law, and assignment may be of the whole right or partial and either general or limited to any place or period, and any interest in the right may be granted by license, but assignments or grants are not valid unless in writing signed by the owner of the right with which they deal.

Artistic Copyright is personal property of the same class as ordinary copyright. Since the new Copyright Act it endures for the same period, and subsists in every artistic work made in Australia since the commencement of the Act. The term artistic work is so liberally defined that it includes photographs, but by a special provision when a photograph is made to order

CHAP. III. for valuable consideration, the person to whose order it is made is entitled to the copyright as if he were the author of it ; a similar provision applies to portraits, and thus it is not competent for an artist or photographer to multiply copies of portraits against the will of their employer.

In other cases if the employer desires exclusive rights, he must arrange in express terms for them.

The Registrar of Copyrights keeps registers
of literary copyrights,
of fine arts copyrights,
of International and State copyrights.

The owner of any class of right recognised by the Act may obtain registration, and assignments and transmissions may be registered, but trusts may not. Every register is *prima facie* evidence of the particulars recorded in it. And registration of copyright or its assignment is therefore useful evidence of title.

Trade Marks are a form of personal property akin to Patents and Copyrights, though usually they have but little value except in conjunction with the good-will of a business, and registered trade-marks are only assignable in such a conjunction. The Commonwealth has dealt with this form of property in the *Trades Marks Act*, 1905. Until the Governor otherwise determines, the Commissioner of Patents is to be the Registrar of Trade Marks.

Trade-marks which do not contravene certain specified conditions are registrable, and if registered must be in respect of particular goods or classes of goods. Application to register is required to be made somewhat in the same fashion as in the case of patents, and provision is made giving to parties who have adverse claims the opportunity to oppose registration ; when registered, the person entered in the register has power to assign the trade-mark and give effectual receipts for any con-

sideration for such assignment, and equities in respect of a trade-mark may be enforced in like manner as in respect of any other personal property. Registration is for a period of fourteen years, but may be renewed from time to time. CHAP. III.

State Acts are superseded, and rights at present in force under them are maintained as in the case of patents.

Designs.—A form of copyright is obtainable for any new and original design which has not been published in Australia before the lodging of an application for its registration. This is under the *Designs Act*, 1906 (Commonwealth). The application may be made by the first owner of the design; and the word design means an industrial design applicable in any way or by any means, to the purpose of the ornamentation, or pattern, or shape, or configuration, of an article, or to any two or more of those purposes. There is a Registrar of designs, and copyright is to subsist in every design registered under the Act, and continue while the registration remains in force. A registered design is personal property capable of assignment and transmission by law.

CHAPTER IV.

CONTRACTS.

CHAP. IV. **N**EARLY every transfer of personal property that is made in modern business is the result of a contract of some kind or other—or a step in a contract. Practically, all mercantile business consists in innumerable contracts. For business is mainly concerned with the exchange of commodities: it is in their homes, their grounds, clubs, and in places of recreation that people enjoy their ownership of goods. In business people are bent upon earning, acquiring, exchanging, and on dealing in things of which the ownership is desired. The merchant deals in wares; the shipowner in freight; the insurance company in insurance or cover; the banker in cash, credit, and documents of credit. And every deal involves a contract or contracts; therefore, it is essential that a mercantile clerk who desires to understand the business in which he is employed should make himself acquainted with the principles of the Law of Contract and especially with the features (including the legal features) of that class of contracts with which his business is especially concerned. This is really important to employer and clerk alike, for it has in modern times become the habit of lawyers, including Judges, to consider in the first instance, in any matter that comes before them, what is the exact (if any) contractual relationship of the parties.

Of course it is not possible in a book upon Banking Law to find room for as much of the law upon contracts as is advisable for mercantile men to know; but the following epitome of some of the chief features of the

Law of Contracts is given for the benefit of students who have not already learned something of the subject, and the peculiar features of contracts where bankers and their customers are involved can be gathered from later chapters. CHAP. IV.

A contract may be defined as an agreement enforce- Definition.
able at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.

There are many legal agreements which fall short of being contracts, and many obligations which arise from sources other than contract. In a contract, agreement and obligation are combined in the way described.

The law relating to contracts has been philoso- Formation.
phically analysed by jurists, especially by Professor Anson, who has shown the elements essential to the formation of a valid contract to be

- (1) Offer and acceptance,
- (2) Form or Consideration,
- (3) Contractual capacity of the parties,
- (4) Reality of consent,
- (5) Legality of object.

(1) *As to Offer and Acceptance.* The offer must be intended to create, and capable of creating, legal relations between the parties. To create obligations, there must be acceptance of the offer. An ordinary invitation to dinner is not (by reason of its intention) such an offer, and no particularity in the acceptance of it could make the host liable to his guest for breach of contract if he subsequently failed to provide the dinner. The acceptance of an offer may be effected though the post in cases where the offeror has indicated that mode; in cases where the post would be the usual course of business, the offeror would be considered to have offered

CHAP. IV. that mode. Until acceptance, an offer may be revoked. If unaccepted it lapses after expiry of a reasonable time; if revocation be by post, it is not effective till it reaches the notice of the offeree, but in the case of an acceptance by post the contract is concluded at the moment of despatch.

(2) As to *Form or Consideration*. It is their solemn form which gives peculiar validity to contracts under seal, which the law will hold to be good, even though on one side there be an entire absence of consideration; such a contract will be operative as soon as the deed containing it has been signed, sealed, and delivered by the parties for the purpose of taking effect.

Contracts which are not made in such solemn form, but in writing simply or made by word of mouth or by mere conduct, are termed parol or simple contracts, and the presence of valuable consideration is a universal requisite for all such contracts; without it any such contract will fall to the ground and can be successfully repudiated. Provided consideration has been given, however, a contract will have been made and cannot be avoided upon the ground that the consideration was insufficient. If such a question were raised in a court of law the court would require, therefore, to be satisfied that something of value in the eye of the law had been given; but would not go beyond that and inquire into the adequacy of the consideration. "A mere staying of the hand of the creditor" has been held to be valuable consideration to support a parol contract; and to give a better or different class of security for portion of an existing debt would be consideration for a promise to forego the balance.

Aliens.

(3) As to *Contractual Capacity*. Incapacity of parties sometimes arises from professional or political

status ; thus an alien cannot acquire property in a British ship, and may be under a disqualification to apply for holdings of Crown lands, as in New South Wales under the *Act 58 Vic., No. 18, sec. 41*. Formerly he was under other restrictions, but these have been abolished. Foreign states and sovereigns and their representatives, and the officials and household of their representatives are not subject to the jurisdiction of the courts of this country unless they submit themselves to it. Thus a debt could not be enforced against them. This law does not apply to the consular bodies in the capital cities of Australia who are not the direct personal representatives of their sovereign.

CHAP. IV.

Representatives of foreign states.

Convicted felons cannot, during conviction, make a valid contract, nor can they enforce an existing one. But their estates may be placed under sequestration in the hands of an official assignee, or some other person, appointed by the Supreme Court or a judge thereof.

A barrister cannot sue for fees for his ordinary professional services, such fees being in the eye of the law merely gifts.

Formerly, physicians were in a similar position, but now they may sue.

A partial incapacity arises from the state of infancy. Infants may make contracts for the supply of necessities which are binding, and to test what are necessities the special circumstances of each infant are to be considered. All other contracts of infants are voidable at the infant's option, but he may ratify them upon reaching twenty-one years. In certain contracts of a continuing nature, such as those of a lessee, a partner, or a shareholder, ratification may be implied from the infant's conduct, especially if he continue to receive benefits, *e.g.*, to get a share of profits, or to make use of the leased land, and, therefore, a special disclaimer upon reaching full age is in such cases generally necessary to avoid the contract.

CHAP. IV. Contracts not of this nature required at common law to be ratified in order to become enforceable, but by Lord Tenterden's Act any such ratification is useless unless made by some writing signed by the party to be charged therewith.

Lunatics and drunkards.

A further inability to contract, and, therefore, to acquire or alienate personalty in the most usual manner, occurs in the case of lunatics and drunken persons. The contract of a lunatic or drunken person is voidable at his option if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing, and that the other party knew of his condition.

Married women.

A disability arising from domestic status, which was formerly very important, was that of a married woman, but, nowadays, a married woman may make any contract she pleases for the acquisition or alienation of property, and is able to sue and be sued, and to have judgment given against her, whether or not she had any separate property at the time of making the contract—or at the date of the judgment—and the judgment may be enforced against any separate property subsequently acquired by her, and she may, in respect of her separate property, be made bankrupt.

Corporations.

Cf. *post*, p. 70

Another form of incapacity arises in the case of corporations, because they are artificial bodies with powers necessarily limited. They may also by the terms upon which they exist be precluded from acquiring or dealing in certain classes of property. An agreement made by such a body might turn out to be *ultra vires*, in which case it would be void for incapacity.

(4) As to *Reality of Consent*. There must be genuineness of consent. A mistake as to the subject matter of a contract may prevent the parties ever coming *ad idem*, and a perfectly good (to all appearances) contract may be drawn up satisfactory to both parties, and

yet be impeached, later on, on the ground that one believed the contract to relate to M, the other to M. Such a case actually happened in this way: a vendor sold and a purchaser bought a cargo of wheat "Peerless" from Bombay. It happened there were two ships, "Peerless" bringing cargoes from Bombay, one of which only was known to the purchaser, the other to the vendor. Each, therefore, had a different belief as to the subject matter of the contract. It was held there never had been a true consensus as to the contract, and it fell to the ground.

CHAP IV.
Raffles v.
Wichelhaus.
2 H. and C.
906.

True consent may also be prevented by a mistake as to parties. X, for instance, knows, or knows of Y, his business, reputation, credit and so on, and offers to make a contract with him. Y' cannot, unknown to X, substitute himself for Y and make the contract binding on X. Such cases may readily occur where contracts are made by correspondence, or through a confusion of agencies.

Misrepresentation sometimes prevents genuine consent, but, usually, if a representation were not made good it would amount to a breach of a condition of the contract, if anything; otherwise, where the misrepresentation was serious, it would fall under the headings of honest mistake, or fraud.

Fraud sometimes interferes with a true consent between two parties, and is a thing extremely difficult of definition; but, nevertheless, the fraud that will avoid a contract has been ascertained to possess certain essential features; thus, there must be a false representation of fact, made with a knowledge of its falsehood or in reckless disregard of the truth; the representation must be made with the intention that it should be acted upon by the party complaining, and must have succeeded in actually inducing action by him. Where these marks of fraud are present, even though there be no evil

CHAP. IV. intention, the party injured would have the right to rescind the contract or affirm it at his option, or to recover in an action of deceit such damages as a jury would hold to be fair compensation for the injury suffered.

Duress and undue influence also sometimes interfere with the formation of a valid contract by destroying genuineness of consent.

(5) *Legality of Object.* It may happen that every other requisite to a valid contract is present except legality of object, but if the object be forbidden or discouraged by law, then the law will not enforce that contract for the benefit of either of the parties to it. Indeed, in some cases, one or both of the parties would become liable to punishment.

There are various ways in which a contract may be tainted with illegality as

- (1) If in direct contravention of the Statute Law.
- (2) If the performance of the contract would involve commission of a crime or a civil wrong.
- (3) If its objects are discouraged by the common law as contrary to Public Policy; of this last would be agreements which injure the State in its relation with other states, or which tend to injure the Public Service, or pervert the course of justice, or abuse legal process, or which are contrary to good morals, or in restraint of trade.

It is impossible in an epitome like the present to offer any useful explanation of the full effect of illegality upon contracts in which it is present.

There are a few instances where the taint in the contract exists only by reason of a statute imposing a fine in respect of such transactions, and sometimes in such cases it has been held the effect and intention of the statute is not to absolutely prohibit the contract, but

merely to make it expensive. In such a case the contract exists and must be performed, but will have to be paid for. In other cases under statutes and at Common Law, if the contract is illegal neither party to it can enforce it against the other. But collateral rights may sometimes arise or be destroyed under such contracts; this, however, is entirely beyond the scope of this work.

CHAP. IV.

With regard to those contracts which depend for their validity upon consideration, and are termed *parol* or simple contracts, they might at Common Law be made orally, and this may still be done in the general case. There is, however, a long list of exceptions which are by various statutes required to be in writing. The chief are those which come under the 4th Section of the Statute of Frauds. It provides—

Writing,
when neces-
sary.

“ That no action shall be brought

“(1) Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or

“(2) Whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or

“(3) To charge any person upon any agreement made in consideration of marriage; or .

“(4) Upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or

“(5) Upon any agreement that is not to be performed within the space of one year from the making thereof;

“ Unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto, by him lawfully authorised.”

CHAP. IV.

Writing is required by the statute, not as giving efficacy to the contract, but as evidence of its existence. Except in the case of guarantees, the consideration as well as the other terms of the contract should appear in writing.

In addition to this list, it is also provided by statute that a promise to pay a statute-barred debt and a ratification of an infant's contract must be in writing and signed by the party to be charged.

With regard to the fifth clause of the section quoted above, it should be noticed that it refers to contracts which are not to be performed on either side within a year; and, if performance within a year by one party is within contemplation in the contract, the case is not within the section. But mere part performance does not take the contract out of the operation of the section.

Executory contracts.

Many contracts may be made and executed forthwith, but more often something remains to be done, and the contract is said to be *executory*. It may be executory on one side only, or on both sides. So long as a contract is executory, a legal obligation connects the contracting parties; an obligation which only ceases with its discharge.

The Discharge of a Contract may be effected in five different ways. These are:—

Performance.

(a) The simplest and ordinary form of discharge is, of course, by the satisfaction of all rights and duties.

New agreement.

(b) The parties may put an end to all remaining rights by making an agreement between themselves to quash or vary the existing one. They are then connected by the terms of the new agreement, which should, as a rule, be made in the same way as the one it is to supersede.

- (c) The contract may be discharged by being broken when a new obligation, *i.e.*, right of action, supervenes and connects the parties. It is not, however, every breach of contract that will discharge the party injured. If the contract be broken in part only, the breach may or may not be sufficiently important to operate as a discharge; and the injured party may not regard it as a breach but continue to carry out the contract, afterwards bringing action for such damages as he may have sustained. Complete breaches may be made by repudiation of the contract or acts equivalent thereto. If a partial breach is to put an end to a contract it must be a breach of a vital condition.
- (d) Impossibility may exonerate; that is, in certain cases, where it arises from circumstances outside the parties. But where one party in the course of performance by his own act renders performance impossible, that amounts to a breach.
- (e) In some cases contracts are discharged by operation of law, *e.g.*, the acceptance of a higher security in the place of a lower, that is to say, a security which, in the eye of the law, is superior in operative power, *ipso facto*, and apart from the intention of the parties merges or extinguishes the lower; again, bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.

In case (c) of these five solutions of the bond of contract, I have pointed out a right of action supervenes; and a right of action arises, even when the breach

CHAP. IV.
Breach.

Operation of
law.

Remedy for
breach of
contract.

CHAP. IV. is not serious enough to discharge the contract. The usual remedy for the breach of a contract is by a personal action, resulting in a judgment for the payment of a sum of money by the defendant to the plaintiff. If the cause of action be an ascertained debt owing, then the judgment is that the plaintiff do recover this sum. But if no ascertained sum be owing, then the action is said to *sound in damages*, and the amount of the judgment should be the sum necessary to compensate the party injured by the breach of the contract sued on, and to place him, so far as money can do it, in the same situation as if the contract had been performed. Usually, the damages are assessed by a jury; and, formerly, this must have been done; but now, where damages are substantially a matter for calculation, the Court may direct their calculation by the Prothonotary of the Court.

There are also the equitable remedies of an *injunction* directed against any repetition or continuance of a breach, and of *specific performance* where the contract is capable of being exactly fulfilled, and damages for its breach would be inadequate compensation.

The remedy by injunction can also be applied by a common law court in addition to compensation by damages.

Penalty or
liquidated
damages.

Sometimes parties, in making their contracts, choose to assess, at the time, the compensation that would be fair to set against a breach, and this is embodied in the contract, and the assessment is known as *liquidated damages*. If a breach occurs and is not settled, the amount to be sued for is that of the liquidated damages settled as a term of the contract; but if the sum, by whatever name called, is, in point of fact, a penalty, the Court will treat it as such, and the stipulation that it shall be recovered as liquidated damages will not prevent the necessity for assessment.

Implied Contracts.—In the foregoing summary, CHAP. IV.
contracts have been referred to throughout as though made in express terms. But often the obligations on both sides, or on one side of the contract, have never been reduced into language by the parties, yet their conduct warrants the assumption that a binding obligation was undertaken as clearly as if it had been expressed in language. In such cases the law treats the parties as having made a firm contract which can be legally enforced. Such contracts are known as Implied Contracts; they are subject to the same rules as to formation, breach, and enforcement as are express contracts. In the ordinary conduct of life, numberless implied contracts are daily made—by hailing a 'bus and becoming a passenger, by ordering a meal at a restaurant, or rooms at a hotel—the implied promises are, of course, to pay the proper charge on the one hand, and to duly perform the service undertaken on the other.

In more complicated cases it would become necessary for a jury to place its true implied meaning upon the conduct in question; the party whose conduct had induced action by another would not be allowed to explain and get the benefit of an intention or meaning other than that which a jury of reasonable men would draw from his actions. Implied contracts of this class are included in the category of simple contracts.

In addition, express contracts whether simple, or under seal, may contain implied terms by reason of being ^{Implied} made subject to a custom or well-known usage, the terms of which are to be incorporated in the contract; thus, if a bank, by one of its officers, undertakes in express language to become a man's banker, or to keep his account, or to that effect, this undertaking is ^{In the bank-} a contract. ^{ing contract.} promise of performance of all the usual customary services of a banker, and in return the customary rights of a banker are conceded. Also, when a contract has

CHAP. IV. been reduced into writing and apparently fully expressed, it occasionally happens that a term is implied as necessarily understood to carry out the intention of the parties as shown in the written agreement, but the case must be such as to satisfy the judicial mind that the parties must have intended it, and that conclusion must be arrived at from something which is actually found within the instrument in question and upon which such an implication can be hung.

This is not much more than to state the general rule that a written contract must speak for itself, and supplementary evidence can only be given to show the meaning of doubtful terms, or the subject matter to which the contract relates.

CHAPTER V.

DEBTS ; KINDS OF DEBTS ; SIMPLE CONTRACT DEBTS ; RELATION OF BANKER AND CUS- TOMER ; STATUTE OF LIMITATIONS ; BOOK- KEEPING OF CUSTOMERS' ACCOUNTS.

Formerly some kinds of debts were more bene- CHAP. V.
ficial for the creditor than others, and a good deal Kinds of
of learning was necessary to know the order of debts.
priority in which debts should be ranked in settling
up the affairs of a deceased person: what debts
should be charged against his real, and what against his
personal estate. This state of things has been altered
by the legislation contained in the recently consolidated
Wills, Probate and Administration Act of 1898, so that
the creditors of a deceased person, testate or intestate,
now stand in equal degree and are paid accordingly out
of his assets whether legal or equitable, real or personal.
Even before this legislation, the bankruptcy statutes had
enacted, that in the case of an estate administered in
bankruptcy all debts proved should be payable *pari passu*,
subject, however, to preferential claims by servants or
workmen for wages earned within six months prior to
the date of bankruptcy, and by landlords for rent accrued post, Cap.
due within the three months prior to bankruptcy. XXIV.

Secured creditors, of course, have the benefit of
their security whether the settling up of affairs follow
upon death or bankruptcy.

Although the importance of correct classification of
debts is not, in these days, so very great, it is still desir-
able to observe some important differences that exist, and

CHAP. V. especially the features of, and the distinctions between, the three main classes should be noticed.

These classes are—

- (1) Debts of Record.
- (2) Specialty Debts.
- (3) Simple Contract Debts.

(1) *A debt of record* is a debt due by the evidence of a court of record. In New South Wales the Supreme Court in its several jurisdictions, the District Court, the Land Court, and the Courts of Petty Sessions are all courts of record; and so are the special courts created under the Industrial Arbitration Act, and Mining Acts. These debts of record were, at one time, frequently used as security for loans, but that practice has fallen into disuse. An ordinary debt arising from contract can, when the debtor is in default, be readily turned into a debt of record by means of an action at law by the creditor against the debtor. Text books devote some space usually to pointing out the legal steps whereby the judgment creditor may realise the fruit of his action by execution on the goods of the debtor, &c.; by the time such steps are necessary, however, the matter is usually in the lawyer's hands. Mercantile students will not want details of procedure, and students in law will find them in books upon practice.

(2) *Specialty debts* are debts secured by a special contract contained in a deed. Though specialty debts have been deprived of their priority they are still more favourable for the creditor in that they are not barred by the Statute of Limitations till after twenty years, also, being under seal, they do not depend upon consideration. Usually in bonds and covenants it will be found that the debtor contracts for himself and his heirs to repay the debt, also for his executors and administrators; but there is no longer any necessity for the mention of heirs, nor of executors and administrators.

Bonds are a class of specialty debts, and are usually single or with a condition annexed; the commonest type is that with a condition annexed, whereby A B expresses himself bound to C D in the sum of £1,000 (suppose) with the condition following on, that, if A B repay to C D the full sum of £500, with interest added, by such and such a date, then the bond shall be void, but otherwise remain in full force. Clerks who have anything to do with a bank's securities will already have noticed this peculiarity about bonds that the first sum mentioned, viz., that for which A B expresses himself to be bound, is usually a sum double the amount of the loan, which amount is exactly filled in, in the condition relating to repayment. In old days, at Common Law, the creditor used, if A B failed to fulfil the condition of repayment, to be able to recover the whole amount named in the bond. Later, the Courts of Equity stepped in and modified this law in the same way that they modified the law with regard to mortgages and prevented the creditor from recovering more than the damage he had actually sustained, and courts of law have since followed their example.

CHAP. V.

post, Cap
XXI.

If, however, the arrears of interest should accumulate to such an amount as together with the principal would exceed the penalty of the bond, then the creditor can claim no more than the penalty.

(3) *Simple contract debts* are those not secured by record or specialty; they are Statute-barred after six years, though an acknowledgment or promise to pay is sufficient to revive them as against the Statute, if it be in writing signed by the party chargeable; and as one of several executors is able to bind his co-executors, an acknowledgment by one of several suffices for this purpose, likewise, in the case of an acknowledgment by one partner of a firm. It will be seen that all the debts which a banker usually owes to his customers upon current account or fixed deposit are simple contract debts.

CHAP. V.

Interest.

Interest on debts was not formerly allowed by law unless it had been expressly contracted for, or could be implied from custom; but now juries may allow interest up to 8 per cent. where there is a certain sum due by virtue of a written instrument at a time which is also certain; and when payable otherwise, then interest can be obtained from the time when demand of payment shall have been made in writing with notice to the debtor that interest will be claimed from the date of such demand. If a bank had allowed a customer to become overdrawn without any agreement and then found him delaying repayment, it would be proper to send such a letter of demand and notice that interest would be charged. In New South Wales no more than 8 per cent. interest may be recovered in any action unless previously agreed.

A debt being a chose-in-action is still unassignable in the eye of the law, but the transfer of a debt may be accomplished indirectly, by words purporting to assign, together with a power of attorney or other authority to the assignee to sue in the name of the assignor. The authority need not be by deed, but may be by writing unsealed or even by parole. Courts of Equity have from a very early date disregarded the Common Law rule as to inassignability of choses in action, and such assignments, when for *valuable consideration*, are held valid by them.

Cf. *ante*, p. 23

If a debt be assigned it is important that notice should be at once given to the debtor, otherwise he might pay the original creditor and obtain a valid discharge.

Debts due to a man who is himself a judgment debtor are liable to involuntary alienation to satisfy his judgment creditor; they are also liable to involuntary alienation upon bankruptcy.

On the question of compromising debts by settling CHAP. V
 an outstanding claim by payment of a smaller sum, it is usual to point out that by a well-settled principle in Compromis-
ing debts.

English law payment in cash of a smaller sum cannot amount to a legal discharge of a claim for a larger amount. This doctrine is founded upon the fact that in such a case there is clearly no consideration to the creditor for foregoing the balance; in the absence of a document under seal, &c., then, the creditor might sue for the balance of the debt, and no contract could be proved extinguishing his right.

The foregoing rule is exemplified in the leading case of *Cumber v. Wane*, where, on being sued for a debt of ^{1 Sm. L.C.} £15, the defendant pleaded that the plaintiff had agreed to accept £5 in full satisfaction of the debt, and the defendant had paid that sum. The plea was held insufficient and defendant compelled to pay the remaining £10.

The leading case has stood as an authority on this point for nearly two hundred years. It appears, however, to be restricted in its application to cases of payment in cash made for a debt due immediately. For, otherwise, another rule of law comes into operation, in favour of the defendant, namely, that if there be valuable consideration given to support a promise, the courts will enforce the contract without regard to the adequacy of that consideration, for parties must be left to make their own contracts. Thus a piece of furniture might be sold for, or set off against, a debt of £100 or more—if parties chose to make such a bargain. Or a creditor whose claim is not yet due would be bound, if he agreed to accept immediate payment of a smaller amount in satisfaction, for he might be supposed to take the advantage of earlier payment to compensate for the difference in amount. Similarly payment in cash, or by a higher class of security, might be made of a smaller

CHAP. V. amount by agreement between parties, in satisfaction of a claim resting upon a less satisfactory security. It would thus appear that even payment by cheque, of a smaller amount in satisfaction of a claim due on demand, would provide a defence to an action on the claim, if the jury were satisfied the creditor obtained the cheque (a negotiable instrument) by offering such a settlement.

But in Q. Cf.
Magill v. Bk.
of N.Q., 6
Q.L.T. 262,
and *post*, Cap.
XI.

In practice between business men—it has been pointed out—the drawer of a cheque, which is offered in full settlement of a larger demand, can always place the matter beyond doubt by sending a post-dated cheque, together with an intimation that unless he hears before the date on which the cheque bears date, that it is accepted in full settlement, it will be stopped.

Sometimes a man calls all his creditors together and makes a compromise with them to pay, and for them to accept, in satisfaction of all debts, a proportionate amount apiece—say five shillings in the pound. It is important to notice that, when such an arrangement is properly and fairly made, there is valuable consideration to support the bargain, and the agreement is sound in law. In such a case, the consideration is not the promise to pay, or payment of, a portion of the debt; that, as I have pointed out, would be no consideration to support a promise by the creditors to forego the residue.

When such a composition is properly arranged, each creditor enters into a new agreement with the debtor, the consideration of which to the creditor is a forbearance procured by the debtor from all the other creditors, who are parties to the agreement, to insist upon their claims.

Rule in
Clayton's
case.

Sometimes it happens that a debtor pays off, at one time, a portion only of his debt (this is, in fact, what happens when a bank's customer, overdrawn in current account, deposits to his credit a smaller amount than the overdraft). When paying a less sum than the whole

amount due, it is competent to the debtor to appropriate the payment to any part of the demand he may please; if the debtor do not appropriate the payment, the creditor may elect, not only at the time of payment, but "up to the very last moment," to appropriate it to any part of the debt he may think fit. But if no election as to appropriation is made by either side, the rule is that the first item on the credit side is taken in or towards satisfaction of the first item on the debit side, and so on in order of time, but payments are to be applied in satisfaction of interest before principal.* This rule runs through the whole law of accounts. It would apply equally to a man's tailor's bill as to any other account. The rule is known as *the rule in Clayton's case*, and a consideration of the facts of that case will show how important its results may be.

CHAP. V.

Seymour v.
Pickett, 1905,
1 K.B. 715.

(1816), 1 Mer.
572.

The case of *Devaynes v. Noble* was one in Chancery in which a great number of parties were involved. Devaynes had been a partner in a banking firm, but was dead. Some time after Devaynes' death the bank went insolvent. Questions arose as to whether Devaynes' estate could be made liable to satisfy certain, or certain portions, of the claims of customers against the bank. Clayton represented the class of creditors who, after the death of Devaynes, continued to deal with the surviving partners, both by drawing out and paying in money. At the date of Devaynes' death Clayton's account was in credit £1,713, and before any further deposits were made he drew from the bank about £1,260, reducing his credit balance to something over £400; later still he made further deposits and further drawings, his account never again falling so low as £400, and at the date of bank-

Clayton's
case.

* With respect to the appropriation of payments and liability for interest on overdrawn Bank accounts when interest is debited and capitalised half-yearly, cf. *Paris Bank v. Yates*, 1898, 2 Q.B., 460, 466, 467, and *Commercial Bank of Aust. v. Colonial F. M. I. and G. Corporation*, 4 C.L.R., 57, 69.

CHAP. V

ruptcy it was in credit more than £1,713. The whole amount of his drawings since Devaynes' death had amounted to more than £1,713. Unable to recover all his money, Clayton tried to make Devaynes' estate liable for the £1,713, or so much of it as he had been unable to get from the bankrupt partners. During the progress of the case, Clayton's claim against Devaynes was reduced to the £400 odd, below which his account had never been since Devaynes' death. It was held, however, that he had no claim upon Devaynes' estate for any such amount, the judge, applying the rule (I have just explained) to which a careful research into previous cases and the existing law had led him, decided that the moneys drawn from the bank by Clayton since Devaynes' death must be taken as received in satisfaction of his claim against the bank arising from his earlier rather than his more recent deposits, and as these drawings had exceeded £1,713, there was really nothing left of the debt as it stood when Devaynes was responsible. It was pointed out that if it were possible for Clayton to go back to the time of Devaynes' death, there might be no limit to such a proceeding. Should he be allowed to do so, and find Devaynes' estate insufficient to answer his claim, he might go back on the same plan to an earlier partner X, also dead, and claim again there, provided he had always kept a credit balance. Thus it became clear that to decide the case upon any other plan would lead to absurdity.

In his work on banking, Grant says the rule may be stated thus:—"Presumably it is the sum first paid in that is first paid out, and the first item on the debit side of the account that is discharged or reduced by the first item on the credit side."

Applies to
banking.

It might be put forward as a reasonable view that this rule is proper enough, yet would not apply thoroughly to dealings between a banker and his customer; that a banker is to some extent a trustee for his customer,

or an agent with peculiar rights and duties, and that a law of accounts sufficient to regulate rights between parties occupying the simple relations to each other of creditor and debtor does not meet the case of banker and customer. CHAP. V.

Such a view, however, would be unsound. The matter is fortunately set at rest by a clear set of authorities. In one of these cases, *Foley v. Hill*, the plaintiff applied ² H.L.C. 28. in Equity for relief, which is in proper cases always granted to one claiming as a *cestui que trust* against his trustee. The defendant was, in fact, a banker, and the plaintiff his customer, and the Court had therefore to consider carefully what their relationship really was.

The following is a passage from the judgment of the Lord Chancellor:—"The money placed in the custody of a banker is to all intents and purposes the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it in jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal when demanded a sum equivalent to that paid into his hands." In his judgment in the same case Lord Brougham says:—"This trade of a banker is to receive money and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor." In the case of *Pott v. Clegg*, (1847), 16 M. & W. 321. decided in the previous year, the matter is put in this way:—"The relation of banker and customer is the ordinary relation of debtor and creditor, with a superadded obligation on the part of the banker to honour his customer's drafts upon him to the extent of that customer's credit." And if the positions are reversed the relationship is the same.

CHAP. V.

Foley v. Hill was decided in 1848; a similar view was taken in 1874. This matter is discussed again, pp. 86, 87.

And see *post*,
pp. 86, 87.

Election by
bank.

These two firmly-settled cases are, then, at the root of the law controlling the relations of a bank with its customers on current account. Of course, for the rule in *Clayton's* case to apply, the account must be continuous: one way in which a bank can, and frequently does, exercise an option as to appropriation of payment is by making an account discontinuous. Thus, A's account is overdrawn, and guaranteed—let us suppose by X; X dies; the bank then rules off (or closes) A's account, which shows a debit balance. A makes further deposits, which are credited to a new account, and draws against them; this is now, in fact, his working account. The bank then uses its security, and sues X's executors upon the letter of guarantee, and successfully recovers the amount owed by A on the first account; now, had the bank not taken the precaution of ruling off that account, but allowed A to go on operating on the old account, X's executors might have refused payment, and said:—"By the rule in *Clayton's* case the debts first owed are first paid off; therefore all deposits made by A after the death of X go to pay off that debt first, and what A now owes you is a new debt, and outside the guarantee." This law was decided in *Sherry's* case, where executors unsuccessfully endeavoured to make a bank treat as a continuous account one that had been ruled off in this way.

1884, 25 Ch.
D. 692.

The same principle will apply in the case of an overdraft of a business firm, and a change of partnership. If the bank wishes to look to the old firm for repayment, it should be careful to rule off the account, but if the business is to be carried on by a differently-constituted firm in the old name, which is to take over the banking account, and the bank is content with this, there is no need to make the break.

The relation between a bank and its customer being CHAP. V. that of debtor and creditor, it follows that a debt in one Set off. account may be set off against a credit in another, and that either by the bank or the customer, and even though the accounts be at different branches, but the accounts must be in the same right; thus a bank might set off a man's credit in private account against a debt owed to it at a branch by the same man in his business account, though not in his trust account.

Current Account Ledgers.—In the case of the debts due to or by a bank upon its current accounts, these are, of course, shown by the balances of the current account ledgers. It is the case that no business book-keeping has so high a legal sanction as that which shows a bank's dealing with its customers. This is by virtue of Part IV. of the Evidence Act of 1898 (N.S.W).

The chief provisions of this enactment are to the Evidence Act. effect that a copy of an entry in a banker's book is to be evidence of the entry itself, and also of the matters, transactions, and accounts therein recorded. For such a copy to be received in evidence, it must be shown to be from one of the ordinary business books of the bank, and that the entry was made in the ordinary course of business, and that the book is in the custody or control of the bank. It must further be proved that the copy of the entry has been examined with the original and is correct. These proofs may be given by a partner or by an officer of the bank, either by word of mouth in court when he produces the copy, or by a sworn affidavit. In a criminal proceeding, if it becomes necessary to prove the state of an account in any bank, or that any person had no account nor funds at a certain bank, it is not necessary to produce the bank books, but the state of the account, or the fact that no account existed, can be proved by an officer of the bank who has examined the books.

CHAP. V. Further, in any action or legal proceeding to which the bank is not a party, the bank cannot be compelled to produce its books, nor its officers compelled to appear as witnesses, except upon an order of a Judge of the Supreme Court made for special cause.

Arnett v.
Hayes, 36 Ch.
D., p. 731.

The purpose of this enactment was, in the first instance, to do away with the need for production in court of banker's books, where they might be detained for some time, to the great personal inconvenience of many of the bank's other customers whose accounts might be in the same book, and of the bank itself; and in addition, to facilitate the proof of transactions recorded in banker's books.

Cf. *post*, Cap.
XVII.

Pass - Books.— Entries in pass-books supplied to customers are, of course, not included in the Evidence Act (not being bank books). But, being entries made by the bank, are evidence against it that the moneys therein mentioned have been duly paid to or by it; but *prima facie* evidence only, and not conclusive; and therefore, if erroneously made and the error is capable of satisfactory proof, an incorrect entry may be explained and put right, even after the pass-book has been issued to the customer. And the customer would not be allowed to fraudulently extort more than was due to him.

After the pass-book has been to the customer and returned by him to the bank without objection, it becomes *prima facie* evidence for the bank, and against the customer, of the entries therein contained.

In "Hamilton on Banking" the pass-book is described as "a copy of the customer's account in the ledger, but with the sides of that account reversed." Thus the credit side of the ledger account is the debit page of the account in the pass-book, and *vice versa*. The reason assigned for this in Gilbert's work on banking is "that the ledger is the bank's account against the customer, and the pass-book the customer's account against the bank."

This is, however, no longer correct, as the plan of arranging pass-books as an exact copy of the ledger account, with the debit and credit columns shown as in the ledger, is now becoming general. CHAP. V.

Statute of Limitations.— When dealing with debt, it is necessary to refer to the Statute of Limitations. The liability to an action in respect of a debt, or an outstanding obligation under a contract is not one that continues everlastingly, but is limited by statute. There are really several Statutes of Limitation. When dealing with personal property, the first and most important is one of the reign of James I., which is in force here. Like a great many other old laws, it has never been expressly adopted or enacted here, but is in force because the first English colonists who came here are supposed to have brought with them and transplanted here all the English law applicable to the new country. Besides, English laws in force on the 25th July, 1828, were by statute 9 Geo. IV., c. 83, prescribed to be applied in Van Diemen's Land and New South Wales, so far as applicable to the circumstances of the colonies; and New South Wales at that time included South Australia (separated 1836), New Zealand (separated 1840), Victoria (separated 1851), and Queensland (separated 1859). A similar provision was separately made for Western Australia. Adoption of
English Law

The Statute of Limitations does not extinguish the debt or discharge the outstanding contractual rights, but enacts that actions brought to enforce them shall be commenced within six years of the cause of action. If any such action is commenced after the lapse of a longer period, it becomes open to the defendant to set up the statute as a defence, but he need not do so; and if the defendant be dead, his executors or administrators are not bound to avail themselves of the statute for the benefit of the estate: it is in their discretion to act as they think Effect of
Statute.

CHAP. V. fit. When a debt is statute-barred, it very seldom happens that the debtor does not take advantage of the statute.

When
Statute does
not run.

By the statute it is provided that when there is a legal or, in some cases, even a practical disability in the plaintiff, such as prevents him bringing the action when the cause of it arises, then time only commences to run against the plaintiff from the date when disqualification is removed.

The disabilities provided for by statute are: minority, coverture, absence beyond the seas, imprisonment, and being *non compos mentis*. When time has once commenced to run, it runs continuously till the limit is reached. Even the death of a defendant does not interrupt it, but it continues to run during the interval between the dates of death and of grant of probate to the executor or grant of letters of administration.

The disabilities mentioned above are such as might prevent the plaintiff taking action, but he might also be hampered by a difficulty in reaching the defendant. Therefore a later Act, 4 Anne, c. 16, provides that in cases where the defendant is beyond the seas when the right of action accrues, then time runs from his return only.

A debt or contractual obligation that would otherwise be statute-barred may be taken out of the operation of the statute by an acknowledgment or promise given by the debtor, but by Lord Tenterden's Act such a promise must be in writing and be signed by the party to be charged.

In such cases a fresh term of six years would commence to run from the date of the promise.

Writing indorsed on a bill or promissory note by the party to whom payment is made, is not sufficient to take the case out of the statute.

A customer's bank balance is a simple contract debt due by the bank to the customer, and therefore in respect of all such balances the Statute of Limitations runs in favour of the bank. Unclaimed balances which are six years stale are therefore incapable of being enforced by action by customers against the bank. It is not, however, the practice of respectable banks to avail themselves of the statute, except in cases where they have reason to believe that they are exposed to an unfair or fraudulent demand which has already been satisfied. Even when items very small and stale have been transferred, in order to save book-keeping, to an unclaimed balances account, there is no doubt that a good bank would very willingly pay each and any of those balances to claimants upon satisfactory proof of ownership.

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Applied to
banking.

In Hamilton's book on banking, the following note is printed at page 21.

In connection with the subject of unclaimed balances and the Statute of Limitations, the following extract from the *Banking and Insurance Record* of 19th June, 1893, will be read with interest:—"In our January issue we alluded to a deposit receipt of the Bank of New South Wales, thirty-nine years old, as having come to light, and having been presented at the head office in Sydney for payment, and having been paid without question. We have to record another instance of the adage 'Safe as the bank.' During the last few days several bank-notes have been presented at the head office in Sydney for payment. These notes, bearing the 'image and superscription' of the Bank of New South Wales, and dated 1st January, 1824, for twenty Spanish dollars, have come to light from other parts of the world, and have been duly cashed on a gold basis of £5 each on presentation. We have seen these notes, and their state of preservation is marvellous, considering their age and the experiences they have gone through. Few among the residents in other colonies know

CHAP. V. that in the parent colony, New South Wales, at one time
 Cf. *post*, Cap. IX. the currency was Spanish dollars—then, as now, the
 currency of China and the Philippine Islands.”

Quære as to
 bank notes.

Bank-notes are in form the same as promissory-notes payable on demand. Such a promissory-note is payable immediately, and the statute begins to operate from the date of the document. It may be possible, however, to differentiate bank-notes from ordinary promissory-notes for the purposes of the Statute of Limitations. I notice that in the *Journal* of the Institute for 1902, at page 276, a question and answer is published, reprinted from the London journal, to the effect that the Statute of Limitations does not apply either to country bank-notes or to Bank of England notes, and Grant's "Law of Banking" is quoted as authority for the answer. Upon referring to Grant, I find his opinion is based on Acts of Parliament which are not in force here, and is, therefore, inapplicable to this country.

Upon the opinion of another writer, Mr. Morse, quoted in Grant, it seems probable, however, that the statute would be held not to apply upon more general grounds, particularly in the case of banks which re-issue their own notes.

In the case of a loan of money for which the debtor received a cheque, the date from which the statute began to run would be the date on which the cheque was cashed.

Specialty
 debts.

Debts referred to in the preceding paragraphs have all been supposed to arise on simple contracts. Those debts, however, which are evidenced by documents under seal, or are secured upon real estate, were not dealt with by the Legislature until a much later period; a large class of them is governed in New South Wales by the Act 8 William IV., No. 3, which enacts that actions and suits for recovery of money secured by any mortgage, judg-

ment, or lien, or otherwise charged upon, or payable out of any land or rent, or to recover any legacy, or personal estate (or portion) of an intestate, are not to be brought except within twenty years after a present right to receive the same shall have accrued to a person capable of giving a valid discharge for the same; unless, that is, some part of the principal money, or interest thereon, has been paid, or an acknowledgment of the claim given in writing signed by the person liable, and then twenty years from the date of such payment or acknowledgment.

A further class of liabilities is dealt with by the Act 5 Vic., No. 9, known as the Advancement of Justice Act, whereby all actions of debt for rent upon any indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognisance shall be commenced and sued within twenty years after the cause of such actions; and all actions of debt upon any award where the submission is not by specialty, or for money levied under a writ of *feri facias*, shall be commenced and sued within six years after the cause of such actions. Under this Act the provisions with regard to disabilities of absence, minority, &c., are made to apply as already described.

PART II.

CHAPTER VI.

NATURE OF A BANK—WHO MAY BE A CUSTOMER—LIMITATIONS OF CORPORATE BODIES—TRUSTEES AND CUSTOMERS IN A REPRESENTATIVE CHARACTER.

CHAP. VI.

Having arrived, through a consideration of the subject of debts, at a view of the relationship of banker and customer, it will be well to consider the nature of a bank, and who may be a customer. The following definitions of banking and banks should be considered.

What is a bank?

Bank.—An establishment which trades in money; an establishment for the deposit, custody, and issue of money, as also for granting loans, discounting bills, and facilitating the transmission of remittances from one place to another; a company or association carrying on such business.—*Imperial Dictionary.*

Banks may be classed in various ways—

(a) According to their constitution or proprietorship, as

Private

National

Joint Stock

(b) According to their functions, as

Banks of Deposit

Discount

Issue, or Circulation

Most modern banks are Joint Stock, and combine all or several of the true banking functions. A bank may be

National, in the sense of being State-owned; or a bank may be national in fulfilling national functions by arrangement with the State without State ownership; on the other hand, the State may deal with a bank as private persons do. Private bankers are, it is believed, hardly to be found in Australia, though many remain in England and the U.S.A. All, or nearly all, Australian banks are owned by Joint Stock Companies, who undertake all ordinary banking business.

The term "*bank*" is derivatively the same as "bench," meaning counter, and was applied to the benches or counters on which Italian bankers carried on their business in the public markets upon the revival of commerce in the twelfth century.

The following statutory definitions should be considered. They occur in Acts which are of great importance in the Law of Banking; but are, generally speaking, of very little use as definitions, for they involve in the body of the definition the word bank, or banking, and thus convey but little explanation. The use of each is therefore confined to matters within its own statute, and each must be expanded if necessary by filling in the true English meaning of "bank" or "banking."

In the Banks and Bank Holidays Act the word *bank* No. 9, 1898,
s. 3. means—

- (a) Any company, firm, or individual engaged in New South Wales in the discounting and issuing of bills and notes, lending money on securities and cash credit accounts, and other matters relating to the ordinary business of banking; or in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand; and
- (b) Any company, firm, or association receiving money on deposit in New South Wales and

CHAP. VI.

trading under limited liability, although such company, firm, or association does not issue bills or notes payable to the bearer at sight or on demand.

No. 11, 1898,
s. 3.

And in the Evidence Act *bank* or *banker* means—

- (a) Any person, partnership, or company engaged in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand; and also
- (b) The Savings Bank of New South Wales; and
- (c) Any Government or Post Office Savings Bank established under any law in force for the time being.

Expressions relating to “bankers’ books” include ledgers, day books, cash books, and other account books used in the ordinary business of the bank.

No. 40, 1900,
s. 4.

And in the Crimes Act *banker* includes every director or manager of any banking company, whether incorporated or not, or of any branch thereof, and every person carrying on the business of a banker.

51 Vic.,
No. 2, s. 2.

And in the Bills of Exchange Act *banker* includes a body of persons, whether incorporated or not, who carry on the business of banking.

“Sound banking involves the promise to pay metallic money, and therefore is based upon such money.”—*Extract from an article on the Elements of Credit, “Bankers’ Magazine,” February, 1904, p. 186.*

And the following definition may be useful:—

Banking a
trade or
business.

Banking.—A trade in money and credit, and in documents of credit and finance, by way of the exchange of money for credit and *vice versa*, or the exchange of one form or kind of credit for another, carried on by a person or persons, singly, or in partnership, or as a corporate body, or by a Government.

But Jessel, M.R., said in the case of *Smith v. Anderson*, "Banking is not strictly a trade." It was, however, made a trade, within the meaning of the early Bankruptcy Statutes in England, when the relief afforded by bankruptcy was available to traders only; and the author ventures to think that, in the best English, banking is correctly termed a trade; it is, at any rate, a business, which is a term of more extensive signification. Upon the other hand, the practice or use of skill in finance by the individual may be properly termed a profession.

CHAP. VI.
1880, 15 Ch.
D. 247, and
per Willes, J.,
1865, 1 C.P.
148.

The nature of the relation of banker and customer is one which has been developed by mercantile custom. It is now a relation well known in law, which originates in a contract, and has certain distinctive features.

Nature of the
relation.

The nature of the business of bankers is a part of the Law Merchant, and is to be judicially noticed by the Courts.

Its recogni-
tion in law.
Brandao v.
Barnett, 12
C. & F. 787,
and cf. 6 Moo.
P.C.C. 152,
173.

The chief features of this relationship are—(1) It is simply that of debtor and creditor, with the superadded obligation of honouring the customer's cheques or drafts to the extent of his credit. (2) In the law of evidence a certain statutory sanction is given to bank book-keeping. (3) The bank is said to owe its customer some duty of secrecy (the extent of which will be dealt with later). (4) In certain cases a banker's lien arises over documents belonging to the customer.

Principal
features.

But though the chief features of the relationship may be thus summarised, it would not be easy to give an exhaustive definition. Nearly all banks are willing to become bailees of valuable securities or articles, such as jewellery, for their customers; but it is usual to regard this function as outside ordinary banking business, and therefore no banker's lien arises over anything deposited merely for safe custody upon a gratuitous contract. All banks are constantly acting as agents of their customers

CHAP. VI. in respect of the collection of cheques, &c.,* and often in other matters. Further, the relationship between a bank and customer A B may be different from the relationship of the same bank and customer C D, by reason of some express or special arrangement between the parties.

But the kernel of the relation lies in the existence of a current account (whether in debit or credit does not matter), and the application to the account by law of the ordinary rules relating to debts and of the customary obligation to honour cheques. It may be doubted whether the relation of banker and customer can exist in the absence of a current account. (This is dealt with more fully, Cap. XIII.) But wherever there is a current account the relationship arises, and the courts are bound to take judicial notice of its established legal features.

Who May be a Customer.—Persons, in law, are comprised in two classes—(1) *natural persons*, i.e., ordinary human beings; (2) *artificial persons*, i.e., bodies created by law and given the status of persons or individuals, so that as parties to an action they may maintain or defend legal rights. Such bodies have not a natural but an ideal existence; that is, they exist in men's minds, but you can nowhere meet or touch them in person, though you may meet in actual existence their representatives or agents, such as the directors (or other officers) of a public company or the aldermen of a borough.

The subject to be discussed may be treated by putting forward the general statement that "anyone may become a customer of a bank," and then qualifying this by pointing out the restrictions that prevail in certain cases.

Infants.

First, in the case of natural persons, there may be restrictions due to youth or domestic status. In-

* This function has statutory recognition in the crossed cheques sections of the Bills of Exchange Act.

fants, for instance, have not complete contractual CHAP. VI.

separate property, and would not bind her husband. As a matter of prudence, therefore, before allowing a married woman to overdraw, a banker should be satisfied that she

CHAP. VI. in respect of the collection of cheques, &c.,* and often in

[*Addendum to p. 67.*]

Infants.

In N.S.W. the Moneylenders and Infants Loan Act, No. 24, 1905, § 7 (15th November, 1905), put an end to the former validity of ratifications by infants on attainment of full age.

In England similar provision was made in 1874 by the Infants Relief Act (37 & 38 Vic. c. 62). Cf. Roscoe (17th), p. 668, also 55 Vic. c. 4.

The section of the Act in N.S.W. is as follows:—

No. 24, 1905, § 7. If any infant, who has contracted a loan which is void or voidable in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement or otherwise in relation to the payment of money representing or in respect of such loan shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

No such enactments have been passed in any of the other states of Australia (Vic. to end 1906, Q., S.A., W.A., and Tas. to end 1905).

In New Zealand, however, see the Act No. 4, 1887, §§ 11, 12; of which section 12 is as follows:—

No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

DE RESTRICTIONS DUE TO YOUTH OR DOMESTIC STATUS. 417

* This function has statutory recognition in the crossed cheques sections of the Bills of Exchange Act.

fants, for instance, have not complete contractual capacity; but the contract of an infant is good until revoked, which can be done at the pleasure of the infant, unless for necessities, when the contract cannot be revoked; and if brought under review in a Court of Equity, such contracts will be held good if for the benefit of the infant, but those which are not beneficial or necessary cannot be enforced. There is, therefore, no objection to an infant lending his money to a banker and becoming a customer on a creditor account current, and in such a case the bank would, of course, be justified in paying all cheques in the usual way, and, indeed, would have the same liabilities upon dishonour of an infant's cheques as in the case of customers of full contractual capacity; but an infant should not ordinarily be allowed to overdraw, for he could defend an action for the debt on the plea of infancy. An infant's promise to pay such a debt, however, ratified by him after attaining his majority, and the ratification in writing signed by him, would, of course, be good.

CHAP. VI.

Cf. Paget,
p. 13.

Of a similar class were the restrictions formerly operating in the cases of married women. Nowadays, however, if, when a woman marries, she has already a banking account, that property does not become her husband's, and she is at liberty to continue the account, operating upon it in exactly the same way as if she were a single woman. If she has not already an account, she may open one, and the moneys which she earns or receives by virtue of her own contracts or from her own property, are her own, and she may pay these into and draw them from the bank, which will be as safe in dealing with her through such an account as if she were a single woman, and she may sue or be sued at law. Judgments, however, would be against her only, and bind her separate property, and would not bind her husband. As a matter of prudence, therefore, before allowing a married woman to overdraw, a banker should be satisfied that she

Married
women.

CHAP. VI. is possessed of separate property, and also that it is not subject to a restraint against anticipation, a condition often found in married women's settlements.

For such an account as I have just described, a husband's authority is not at all necessary. It is still, however, sometimes asked for, out of a prudent desire to be on the right side, and, perhaps, to tie the husband's hands in the case of some of his moneys being mixed in his wife's account. A document which would directly fulfil this purpose would be a declaration from the husband that his wife has separate estate, and that the moneys intended to be paid in from time to time to her account are her separate property. It is submitted, however, that, even should the wife, unknown to the bank, pay moneys of her husband into her account, it would not, in ordinary cases, be competent for the husband to follow these items so as to make the bank responsible. *Cf.* later, p. 87, *Jus tertii*. But a Court of Equity would treat the wife as a trustee for her husband.

A second class of disability arises from the permanent or temporary mental aberration of lunacy or drunkenness:—

Lunatics.

(a) *Lunacy*.—It is necessary to refer to three classes dealt with under the Lunacy Act, viz., “insane patients,” “insane persons,” and persons (though not lunatic) incapable of managing their affairs. Under the Lunacy Act of 1898, the estates of “insane patients” are managed by the Master in Lunacy, who may do such acts and exercise such powers with respect to an estate committed to his care as the patient himself could have done if sane; that, of course, includes the management and continuing of a bank account, and the power to close it and collect the estate. An “insane patient” is one who was at the date of commencement of the Act detained in any public or private establishment in New South Wales for the re-

Insane
patient.

ception of the insane, and anyone afterwards received into and detained in any such place appointed or licensed for the purpose or boarded out or absent from such an institution, but still under its management generally, and also one for whose care the Government has made provision with the Government of an adjacent State. CHAP. VI.

Where anyone other than an insane patient is an insane person or incapable of managing his affairs, the Court may, if necessary, appoint a committee of his estate, and under the direction of the court this committee—or, in the case of a simply incapable person, the person to whom the management of the estate has been entrusted—has a complete power of managing the estate. Insane person and persons incapable.

Leaving on one side the powers of the court or its officers under the Lunacy Act, we find that at common law the contract of a lunatic is binding upon him unless it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing, and that the other party knew of his condition, and a lunatic can be made to pay for necessaries. Position of lunatic at Com. Law.

“When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.” This extract forms a portion of the judgment in the case of the *Imperial Loan Co. v. Stone*, 1 Q.B., 1892. In this case the Loan Company, who were holders of P.N.’s of which Stone was indorser by way of surety, sued him, and he set up the defence of insanity. The jury found insanity proved, but disagreed as to whether the plaintiff company knew, at the time of the transaction, of his insanity. It was held, upon appeal, that this

CHAP. VI. finding gave an insufficient defence, for defendant could not escape liability unless he established to the satisfaction of the jury the fact of knowledge in the Loan Company. Thus it is not necessary for bankers or others to look for insanity in the indorsers of P.N.'s, but unsafe to deal should they be aware of it.

Drunkards. (b) In the same way, the incompetence of a drunkard is to some extent protected by the law, for there is a rule that a contract made by a person in a state of intoxication may be subsequently avoided by him, but if confirmed it is binding.

Other cases. In the case of natural persons, a third group of disabilities is found depending upon professional and political status. These are, however, of very little practical importance to bankers. They have been sufficiently discussed under the head of contractual capacity.

pp. 34, 35.

Limitations of Corporations—Disabilities which arise from artificiality of person.—A corporation is an artificial person created by law, hence the limitations to the capacity of a corporation for entering into a contract may be divided into *necessary*, *i.e.*, arising from the nature of the body, and *express*, *i.e.*, depending upon the terms of incorporation. A corporation is an artificial entity or body quite apart from the persons who compose it; their corporate rights and liabilities are something distinct from their individual rights and liabilities, and they do not of themselves constitute the corporation, but are only its members for the time being. A corporation has, then, an ideal existence apart from its members, and it follows that it cannot personally enter into contracts; it must contract by means of an agent. It cannot act in its own person, for it has no

Cf. *post*, p. 83 person (*i.e.*, natural person). Therefore it is necessary there should be some evidence of the assent of a corporation to its contract—that is, the corporate seal. For this reason, a bill of exchange of a corporation may be under

Negotiable
documents
under seal.

seal and yet be negotiable; but, in the case of ordinary persons, the fact of a document being under seal would throw it into the class of specialty contracts, and preclude the notion of negotiability. CHAP. VI.

The law with regard to contractual capacity in a corporation may be stated in a slightly different way in the two following propositions:—(1) Corporations by mere implication of law, and without any affirmative expression to that effect in their charters or governing statutes (and of course in the absence of express prohibitions) have the same power to make and take contracts within the scope of the purposes of their creation which natural persons have. (2) This power, on the other hand, is restricted to the purposes for which the corporation has been created, and cannot be lawfully exercised by it for other purposes.

It should be noticed that if a contract, purporting to be made by a corporation, is beyond its powers, it is void on the ground of incapacity—not for illegality.

A corporation may be composed of one person, as the man for the time being filling a certain office, and this would be a corporation sole. It is more usual to find corporations composed of a number of persons, such as the shareholders of a public company or the electors of a municipal borough: these are technically known as corporations aggregate. These two important classes of corporations aggregate, that I have just mentioned, are met with in business every day, and I shall now direct my remarks particularly to them. Corporation
sole.

Corporations
aggregate.
Companies.
Municipali-
ties.

The vast majority of public companies are incorporated under the Companies Act; but they may be incorporated by Royal Charter or by a special Act of Parliament. These latter were formerly the only means of obtaining incorporation. Now, this result is reached by the simple process of registration under the Companies Act. One of the immediate effects of registration is that

CHAP. VI. members of the company are rendered individually liable for its debts, but have the power to limit that liability, either by shares or by guarantee. When a company is limited, it is bound to attach the word "limited" to its title. Every registered company is bound to have a registered office, to which all communications, &c., may be addressed. It is comparatively rare now to find a company doing business except it is incorporated under the Companies Act, but there are, doing business in Sydney, banks which are representative of each class; and in insurance, and other businesses also, which have been long founded, corporations will be found with powers, &c., granted them by Royal Charter, or working under their own Act of Parliament.

Limitations
(1) essential.

A very little consideration will show the existence of limitations in a corporate body's powers founded upon its artificial nature. The impossibility, for instance, of performance by it of a contract to personally execute a given piece of work, or the absurdity of supposing it capable of a breach of the marriage contract.

Limitations
(2) arising
from instru-
ment of
creation.

Limitations founded upon the terms under which the corporate body has its existence cannot be referred to any such philosophical distinction, but are found in each case by examining the terms of incorporation. In the case of limited companies registered under the Companies Act, the objects for which the company was formed are to be found in its Memorandum of Association, while the conditions under which it is managed are in the Articles. In the case of municipalities, the city of Sydney is governed under a special Act of Parliament, and for the others the terms of incorporation are laid down in the Municipalities Act.*

Corporations
may have
banking
account.

Nearly all corporations have to carry on a certain amount of business, or control some money, and that in itself is sufficient in the absence of an express condition

* See now Local Government Act, 1906, s. 12.

to make it proper for the corporation to have a banking CHAP. VI.
account.

With regard to limited companies, there are very few Companies and banks, Act No. 40, 1899. statutory provisions dealing with the company's banking account, but by sections 67 and 68, every limited company must have its name fully and correctly mentioned in legible characters in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, also in all letters of credit of the company, and if any director, manager, or officer of such company, or any person on its behalf, signs, or authorises any bill of exchange, promissory note, cheque, &c., to be signed, without the company's name being mentioned in such a way, that person is liable to a penalty of £50, and is further liable, personally, to the holder of any such bill, cheque, promissory note, &c., for the amount, unless the same be duly paid by the company.

In three cases, at least, in England, the secretary or Atkins v. Wardle (1889), 58 L.J.Q.B. 377. Director of a company has been held personally liable under this provision. The word "limited" is a portion of the name, and must always appear.

Companies have the power to accept and draw bills of exchange if given by their memorandum of association, or rendered necessary as incidental to the business which is their object, and not otherwise.

From what has already been explained, it will be clear to you that, should directors of a company obtain a loan for the purpose of acquiring a business, or opening a new business, foreign to the objects of the company, as discovered in the memorandum of association, the company could not be made liable for that loan; and that contingency should be borne in mind where an overdraft is being granted to a company. Of course, the directors might still be personally liable.

CHAP. VI.

Municipal-
ties and
banks.

With regard to the current accounts of municipalities and shires, in New South Wales the Local Government Act, 1906, deals, in Parts 27 and 28, with the funds and accounts of such corporations, and ordinances and regulations made under the Act prescribe the manner of keeping the banking account, and of operating upon it.

Cf. post, p. 80

In the case of loans, municipalities could only incur such obligations for certain statutory purposes, as permanent improvements, town halls, repayment of former loans, municipal baths and gasworks, &c. To make the corporation liable for a loan, not only must its purpose be within the statute, but it must be obtained after following a prescribed procedure, viz., approval of the Governor and certain advertisements of the proposed transaction. And by the Local Government Act, 1906, there are, in the case of loans for new works or services, additional requirements, as a poll of ratepayers and the making of a loan rate. In almost all cases it would be prudent for the proposed lender, banker or other, to obtain his solicitor's advice as to whether the statutory conditions had been properly complied with.

Trustees and
persons in re-
presentative
character.

With respect to the position of the banker when dealing with trustees, and with men in a representative capacity, such as the managers or secretaries of limited companies and corporations, it will be noticed that generally, when referring to a customer of a bank, it has been assumed that the customer is an individual of full age and legal capacity, having an account, or dealing with a bank, in his own right. That is the easiest and simplest way in which to consider the relationship of banker and customer. It is clear, however, that matters are not always quite so simple.

Dealings with
trustees.

If a man keep an account as trustee, the bank knows him in two capacities, and its conduct towards him may be affected by that knowledge. It cannot,

of course, allow him to overdraw in his private account in consideration of his keeping a large balance at credit of his trust account, for it will not have the right of set-off that obtains when each account is owned by the same man in the same capacity. The bank, on the whole, will require to be distinctly more careful in its dealings with a trustee than with a man acting on his own behalf. A bank is not bound to open a trust account for anyone; but, if it does, then it is taken to be aware that the money in that account really belongs to the trust, and is not the property, for his own benefit, of the person who operates the account. Therefore, should a trustee misapply money of his trust account, and the banker be privy to the dishonest intent of its customer, it might be made liable to the *cestuis que trust*; it is not, however, the duty of the banker to be suspicious of the trustee, and he should not dishonour a trustee's cheque merely on the ground that the transaction is, in his opinion, of a doubtful character.

CHAP. VI.

(Gray v. Johnston, 1868, 3 H.L. at p. 14, and *post*, p. 87)

Judicial opinion seems to have gone further than this, and Lord Westbury thought that, if a banker did incidentally become aware that a trustee had drawn a cheque to effect a breach of trust, he would have no right to refuse payment unless the bank was itself to derive a benefit from the transaction. The reasonableness of this view depends on the general rule that it is no business of the banker to inquire how a man obtains the money he pays in, nor how he uses the money he draws from his account. But if a banker receives money, in payment of a debt, which he knows is not the property of the person who paid it, he cannot retain it against the true owner. Accordingly, where a bank transferred a sum of money from a trust account to the account of one of the beneficiaries under the trust, and thereby obtained payment of a debt due to the bank, it was held the trustees were entitled to have the fund replaced by the bank.

This view is extreme.

Bridgman v. Gill, 1857, 24 Beav. 302.

CHAP. VI.

1871, 6 Ch.
App. 632
Ex p. King-
ston in re
Gross.

Also, where the treasurer of a county kept his private account at a bank, and paid certain moneys received in his public capacity to another account in the same bank, which was headed "Police Account," and, when there was a credit in the public account but his private account was overdrawn, absconded; the bank was not allowed to set off the credit of the police account against the overdraft.

Union Bank
of Aust. v.
Murray
Aynsley,
1898, A.C.
693, and cf.
Bk. N.S.W..
v. Goulburn
Valley Butter
Coy., 1902,
A.C. 543.

But if a trustee, without the knowledge of the bank, pays trust moneys into an account of his own and misapply them, the bank, if it has no grounds for suspecting a breach of trust, will not be compelled to repay such trust moneys to the beneficiaries to whom they really did belong. The bank may deal with such funds as if they belonged to the customer, and retain them in discharge of his liabilities to the bank.

Coleman v.
Bucks &
Oxon., Union
Bank, 1897,
2 Ch. 243.

The following is an illustration of the same principle. A trustee caused a large sum of trust money to be paid into his private account, then overdrawn. He kept no trust account at the bank, but the bank had notice that the money so paid in consisted of trust funds. The bank advised the trustee that the amount had been placed to his credit, and it was left in his private account, on which he continued to draw. Some years afterwards the trustee became insolvent, his account then being largely overdrawn. It was held that the bank, having no suspicion that the trustee was insolvent or intended to commit any breach of trust when he paid the trust money in, was not bound to restore it to the trust estate.

Cf. *post*, p. 87

In short, a trustee is the owner in point of law of the trust moneys paid into his account. Equity will hold him to his trust, and it is no business of the bank to recognise the beneficiaries; yet, having knowledge of the trust, it cannot exercise a right of set-off as in case of a privately-owned account, nor obtain a banker's lien in respect of other business over documents connected with the

trust. And should it become privy to a breach of trust, CHAP. VI.
Equity would protect the estate against the bank.

It is not only in the case of trustees and executors, Dealings but in many other instances, that the banker deals with ^{with persons} men in a representative character; the manager of ^{in representa-} a company, for instance, the town clerk or mayor and ^{tive character} aldermen of a municipality, and so on, are all men through whom the banker deals with impersonal bodies, the creatures of statutes or society, and limited as to their contractual capacity. There are two chief classes of mistake likely to occur in these transactions, and the following cases will serve to illustrate them.

Hannan's Lake View Central, Limited, v. Armstrong 1900, 16
and *Company*.—Briefly, the facts were that Hannan's ^{T. L. R. 236.}
Lake View Central, Limited, sued Armstrong and Com- ^{Scope of}
pany for £542. Armstrong and Company were bankers, ^{authority.}
and the amount in question was that of a cheque which
had been collected by them for their customer Henry
Montgomery, passed to his credit, and drawn upon by him.

The cheque in question had been drawn by another company in favour of the plaintiffs, payable to the plaintiffs or order, and crossed generally. Montgomery was secretary to the plaintiffs; he indorsed the cheque as for the plaintiffs, and, having thus made it *prima facie* negotiable, so the defendant bank claimed, passed it to the credit of his own private account.

Mr. Justice Kennedy inferred that it was the secretary's duty to pay to the company's credit at its own bank all moneys received by him for that company, and for that purpose he was tacitly, at least, authorised by the directors of the plaintiff company to indorse cheques received by him as their secretary. That authority, however, was of no greater extent; it was not express, but implied; and the articles of the company were such that it was doubtful whether the directors, had they purported

CHAP. VI. to do so, could delegate to their secretary the indorsement of cheques; however that might be, the conduct of the company had, as against itself, been such as would prevent it denying the secretary's authority to indorse cheques as a matter of business routine for purposes of collection simply. This case was not one covered by that authority. The question, then, was: Were the bankers protected from the plaintiffs' claim by section 82 of the Bills of Exchange Act? The protection of that section is given to a banker who in good faith and *without negligence* receives payment of a cheque crossed generally (as this cheque was), where the customer has no title or a defective title thereto; it is enacted by the section that, in such a case, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. Now, as to the phrase, "without negligence." Mr. Justice Kennedy said, "It means, I take it, without want of reasonable care *in reference to the interests of the true owner*"; and he held the bankers liable, for, being business men bound to act with reasonable care to the plaintiffs, they were not entitled in the *circumstances* to assume without inquiry (which could have been easily and promptly made) that Montgomery had authority to indorse to the bank as he did.

The circumstances were: that the defendants knew that Montgomery was a servant of the plaintiff company; they also knew the company had a banking account of its own; that, on the face of the transaction, Montgomery was using for himself a valuable document *prima facie* created in the benefit of his employers; that the defendants had not had with Montgomery any like transaction before; that they could bring no evidence to show such a transaction was customary; that their chief accountant admitted all this, and that he knew plaintiffs in the ordinary way paid Montgomery with their own cheque on their own bank; and that he had never known an instance

of any secretary of a limited company indorsing by himself a cheque payable to his company, except for the purpose of the cheque being paid in to the company's own banking account. CHAP. VI.

This case illustrates clearly the danger of dealing with a man in his representative capacity unless he is acting within the scope of his employment. In other words, you must look carefully at the appointment and extent of authority delegated to its representative officer by a company or corporation, and you cannot afford to deal with him except within the limits of that authority, lest yourself and your bank have to suffer.

It will be noticed that this case is one which might have been used as an illustration of the power of a bank's officer to bind his bank by his conduct of business within the scope of his authority; for the principle involved is the same. No bank, company, or corporate body is bound by the act of an individual servant unless in the ordinary scope of his employment, or by his being specially authorised thereto. It is necessary to see the thing, however, from both points of view—(1) how a clerk may make his own company liable; (2) what circumspection is required in dealing with the representatives of other companies. Cf. *post.*
chap. XX.

Not only is it important to be alert as to the authority wherewith the representatives of a corporate body are clothed; it is also very necessary to be sure that the corporate body itself is not going beyond its powers in the contracts it makes. If, after the shareholders of a company have appointed their directors to carry on and manage the specified business of their company, those directors choose to assume heavy liabilities in the name of the company, but really to carry on other undertakings, it would be obviously unfair to allow them to bind the shareholders. In the same way the council of a municipality cannot be allowed to assume obligations that Acts purport-
ing to be of
the corpora-
tion may be
ultra vires.

CHAP. VI. might be a heavy burden upon the ratepayers, except in the way and for the purposes allowed them by law.

A good instance of the operation of this law is a case decided in Sydney in 1896. The Commercial Bank of Australia lent about £7,000 to the Municipal District of Lambton, under the following circumstances: The Lambton Council obtained leave, under section 190 of the Municipalities Act, to borrow money to be expended in permanent improvements; they thereupon obtained the loan, mortgaging their rates to the bank; they used the money, with the knowledge of the bank, to pay for an electric lighting plant that had already been erected; the section 190 of the Municipalities Act requires certain notices of the intention of the municipality to borrow to be publicly advertised; this notice has to give clearly certain particulars with regard to the intended loan, such as the amount and purposes of the loan, the time, place, and manner of the payment of principal and interest and particulars of the securities, and the council had failed to properly fulfil this condition.

But now cf.
Local Govt.
Act, §§ 169,
170, &c.

Later on, the council made default, and the bank applied under another section of the Municipalities Act for the appointment of a receiver, by way of availing itself of its security over the rates. It was held the application must be refused, on the ground that the council had no power to borrow the money for the payment of an existing debt in such a way as to bind the municipality; also that the condition with regard to notice must be strictly complied with to give such a loan validity.

The following is an extract from the decision of the Chief Justice:—

(1896) 17
N.S.W.L.R.
187, at p. 190

“It may be said that this decision will lead to great hardship upon the bank who have advanced the money to pay for a work of permanence of which the municipality reap the benefit. It may be so, but the bank who were lending upon a statutable security, ought to have

seen before they advanced the money that the requirements of the statute had been complied with. It was within their power to do so, for the notice required was a public notice. It was as much within their power to ascertain this as to ascertain that the Governor's sanction had been obtained. Perhaps the principal object of the notice is to safeguard the rights of ratepayers, who, if informed that the time, place, and manner of the payment of the principal and interest due thereon, was to be that both principal and interest were to be payable on demand, failing compliance with which for three months a receiver could be appointed, might have taken steps to prevent money being borrowed upon what might appear to them to be dangerous and improvident terms. I quite agree with the observation made by Lord Bramwell in the case of *Young v. the Mayor of Leamington* (8 App. Cas. at 528), where, in holding that the words of an Act amounted to a condition precedent, and were imperative, he says:—'I must say I do not agree in the regret expressed at having to come to this conclusion. The legislature has made provision for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of the safeguards, and improvident engagements *were* entered into. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.' That was the case of the neglect to make the contract under seal, the statute requiring contracts over £50 to be under seal. Here I have only to consider and place a construction upon an Act of Parliament, and, being of opinion that the Act requires that before any loan shall

CHAP. VI. be contracted a notice containing certain information shall be published, and as such notice has not been published, I cannot make an order for a receiver under the provisions of section 191, the power to do so being, as I hold, confined to cases where the loan has been contracted under the provisions of this Act."

Ibid., p. 191. The judgment of the Full Court was delivered per Stephen, J., who quoted and relied on the following useful passage from an English case, *Chapleo v. Brunswick Building Society*:—"Persons who deal with corporations and societies that owe their constitution to or have their powers defined or limited by Acts of Parliament, or are regulated by deeds of settlement or rules deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution and the extent of the powers of the corporation or society with which they deal . . . and, if, in dealing with such a society, they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness."

(1899) 20
N.S.W.L.R.
361.

This same debt of the Lambton Council has been responsible for a good deal of litigation. In one of the matters that arose out of it—viz., the case of *A.J.S. Bank v. Croudace*, where the bank were suing certain guarantors of the debt—the Court decided that the Lambton Municipal Council had the power to borrow and to incur debts as necessarily incidental to the carrying on of its ordinary business. I mention this simply to show the limitations of the results of the prior case, which is not to be taken as concluding that a council cannot borrow except as expressly authorised by statute; but, rather, that if a creditor is lending on a statutory security, he must at his own risk see that his transaction is one at all points within the statute. Otherwise, though there may be a debt truly enough, the creditor might be remedi-

less. Fortunately for this creditor, it had the security of a personal guarantee. CHAP. VI.

Another point to be borne in mind when dealing with a corporation is that its contracts require to be under seal. I have already pointed out that this rule is very much relaxed in the case of trading corporations who are estopped by their conduct from disputing the validity of the acts of servants in the ordinary course of their employ. And in the case of companies registered under the Companies Act, there is express statutory provision that contracts on behalf of such bodies may be made—

- (1) By writing under the common seal of the company, if the contract be such that if between private persons it would by law be required to be in writing under seal;
- (2) In writing, signed by any person acting under the express or implied authority of the company, if the same contract between private persons would be by law required to be in writing signed by the party to be charged therewith;
- (3) Verbally, by any person acting under the express or implied authority of the company, if the same contract between private persons would be valid if made by parol only.

Cf. Companies Act, s. 241. No. 40, 1899.

But in the case of municipal corporations who are not perpetually trading and entering upon contracts implied from the conduct of their officers, this is not so. Recent decisions, however, show a tendency on the part of Judges, both in England and here, for the furtherance of justice and convenience, to reduce the operation of the rule. For example, contracts of daily occurrence and trivial in nature are outside the general rule; such would be the appointment of workmen or navvies for maintenance of roads; and, following this principle, the Chief

CHAP. VI. Justice of N.S.W., in the case of *Haynes v. Borough of Grafton*, held that the appointment of the plaintiff, who (1899) 20 N.S.W.L.R., p. 324.

was a civil engineer and licensed surveyor, to supervise on behalf of the borough the carrying out of a contract for road formation was the appointment of a minor and temporary official, and, therefore, needed not to be under the corporate seal of the borough. It would not be very safe for one contracting with a borough to rely on a contract without the corporate seal of the borough in any case the importance of which could be ranked higher than this.

By way of conclusion I shall content myself with again drawing your attention to the importance of the points illustrated by the two chief cases quoted. First, be sure the secretary or other representative agent is armed with authority for carrying out the transaction in view; then satisfy yourself the transaction is within the scope of the body he represents.

CHAPTER VII.

THE RIGHT TO THE ACCOUNT—*JUS TERTII*— INTERPLEADER—INVOLUNTARY ALIENATION.

The way in which the central features of the relation of banker and customer can be most clearly brought under review is by considering— CHAP. VII.

- (1) The right to the account, and whether the bank can in any circumstances set up, against the person in whose name an account stands, the right of another person to possess or operate that account. This is called by lawyers, setting up a *Jus tertii*.
- (2) The alleged right to secrecy.

There are numberless ways in which the question of *Jus tertii* can arise with regard to the ownership of a credit balance, and the right to draw it.

For instance, a man's account may be fed wholly by moneys received in respect of an agency from which he is displaced, with funds of his employer's still in the account; it may be fed by trust funds; it may be in the name of a married woman, and fed by her husband's funds. A more extreme case would be where the account was created and supplied by actual cash got by theft. All sorts of cases, short of this in transparent dishonesty, but of increased complexity, may occur. Suppose, instead of cash, that the account has been created from the proceeds of a document got by theft and collected by the bank. Suppose that the customer got the document, not by theft, but by fraud such that he obtained legal posses-

CHAP. VII. sion, though his claims to it could, on discovery of the fraud, be disowned by the party liable, but he transferred before repudiation. The cases may vary infinitely.

The first element to be looked at in such a case would be the obligation of the bank to its depositor arising out of the circumstances under which it obtained the cash, cheques, or other documents of credit whence the credit, in current account, arose. The general nature of this obligation has been determined in cases quite independently of any question of *Jus tertii*. Thus in 1847 it was decided, in the case of *Pott v. Clegg*, that money deposited with a banker by his customer in the ordinary way of business is money lent to the banker, with the superadded obligation that it is to be paid when called for by cheque, and the relationship is not altered by an agreement to pay interest on the balance. Therefore, if for six years there has been no payment of principal, nor any allowance of interest, the Statute of Limitations applies, and the banker could avail himself of that defence to an action for the money.

Relation of
banker and
customer is
one of debtor
and creditor.
16 M. & W.,
321.

Statute of
Limitations
applies.

And
customer's
ordinary re-
medies are at
Common
Law.
2 H. L. C., 28.

In the next year there was decided by the House of Lords the case of *Foley v. Hill*. There the plaintiff, who was an ordinary current-account creditor, claimed relief in equity, which would be applicable if the banker were a trustee or *quasi* trustee for the plaintiff, and which was refused, on the ground that the relationship was the simple one of debtor and creditor, and it followed that the plaintiff had, and ought to proceed by, the usual remedies of a creditor to enforce his rights, if any. The following passage occurs in the judgment:—"The money paid into the banker's is known by the principal to be placed there for the purpose of being under the control of the banker; it is thus the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places,

or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is to all intents and purposes the money of the banker, to do with as he pleases. He is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it in jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

(In the above quotation, *principal* is used four times to denote *customer*, and twice to denote *sum of money*.)

In these cases no *Jus tertii* was involved. They are decisions of conclusive authority, and they harmonise with the law which applies to banking accounts the rule in Clayton's case (itself a banking case, date 1816). See *ante*, p. 51.

Twenty years later, in the case *Gray v. Johnston*, the question was litigated as to a bank's liability in the case of misappropriation of funds, in the account of an administratrix, belonging to the trust estate, by means of a cheque drawn by her upon that account and placed to the credit of her private account; the whole transaction being thus open to view of the bank. It was held the bank was not liable; the view that prevailed in previous cases was taken; that the money, when deposited, became the banker's, and the customer a simple contract creditor entitled to call for the amount by cheque. In such a relationship there is no room for the debtor bank to question the customer's right to draw any particular cheque, or set up a *Jus tertii* (right of a third party) against him, though the case would be different if there were a distinct knowledge on the banker's part of the intended fraud, and any attempt to derive a benefit from it—*e.g.*, the liquidation of a weak, overdrawn account.

And there is no room to set up against customer a *Jus tertii*.
L.R. 3,
H.L. 1.

CHAP. VII. This, too, is a decision of conclusive authority, and its principles have been used to assist in determination of many banking cases since 1868.

Cases of trust estates.

Turning to Australian cases, the principles laid down in *Gray v. Johnston* were applied by the Supreme Court of New South Wales to the case of a trustee fixed depositor, who, upon due date, gave orders for the transfer of large amounts upon fixed deposit, which the bank knew to be trust funds, to the credit of his ordinary business account, which was at the time in debt; the Court holding that upon the maturity of a F.D.R. the creditor upon fixed deposit was in a like relation, as regards the bank, to the case of a creditor having funds at current account payable at call—*Dixon v. Bank of New South Wales*; and that therefore, in the absence of complicity in any fraud, the bank should not be made responsible for the disposal of money made upon orders it was not at liberty to disregard.

17 N.S.W.
L.R. Eq. 355

(1857) 24
Beav. 302.

Cf. *ante*, pp.
75, 76.

A further, though somewhat different, illustration of the banker's duty to respect his contract may be seen in the case of *Bridgman v. Gill*; there, a fund was at the credit of two trustees in the books of bankers, who knew that it was a trust fund. By direction of the tenant for life (of the trust estate) alone they transferred it to his account, and thus got payment of a debt due by him: *held*, the trustees could sue to have the fund replaced.

It is thus perfectly clear, on principle, that, in all ordinary circumstances, there can be no right in the banker to set up the claims of another against his customer, where the customer though in a position of trust has a legal title to the account, and to the funds used to supply it; but, as pointed out in the opening of this chapter, the cases that can arise are very various.

In extreme cases, the customer may have no title at all to the cash or paper deposited; and two recent Australian cases seem to indicate that the Courts would not

tolerate an action by a thief brought to recover from a bank the proceeds of his crime, or a credit balance into which those proceeds had been converted. The precise range of such a principle introduces a very debatable field of law, but a review of the recorded decisions is very instructive. CHAP. VII.

In 1814, in the case of *Pinto v. Santos*, an agent for several persons received three large sums, in each of which all his principals had a share, and paid these sums to his bankers, who knew the circumstances. He drew out various sums to the amount of £7,300, and at length went abroad; having some dispute with the other proprietors, they revoked his authority to act as their agent, and he gave notice to his bankers to pay over the residue of his money, which was about £2,700, to no one without his own orders. The plaintiff in the case, Pinto, who had by far the largest share in the property, claimed all this remaining money, and sued the bank (*Santos*) for it. The defendants declared readiness to pay to whomsoever it belonged, but said that, as they received it from the agent, they could pay no one else.

Decision in favour of the banker. It was said: "This is not like the case of one man paying into a bank a sum belonging to one other person." The bank was apparently willing to account for the sum in an Equity suit, where all interested in the fund would have been parties.

In *Sims v. Bond*, 1833, A, as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the East India Company, to pay to the owners or bearer the sum of money therein mentioned for freight. A deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account. After A's death the surviving part owners sued the bank for money had and received, money paid, &c.,

Customer
lawfully
banking the
money of
several.
5 Taun. 447

The question
is, Who
makes the
loan to the
Bank?
5 B. & Ad.,
389.

CHAP. VII. in respect of the balance of this account. The plaintiffs were non-suited, on the ground that there was no privity of contract between them and the defendant bank. Plaintiffs appealed, and again lost. In course of judgment the Court said:

"Sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker . . .; and the plaintiffs who seek to recover the balance of such an account must prove that the *loans* were made *by them*."

Case where
bank not
bound by
contract to
the nominal
depositor.
6 M. & W.,
26.

In *Calland v. Loyd*, 1840, Calland received in 1837 a sum of £373, which he was entitled to receive as his wife's share of property which her father had bequeathed her; he deposited £300 of this money in a bank, and gave the rest to his wife to take care of. Almost immediately afterwards she took a £50 Bank of England note—part of this money—and on the same day paid it into the bank of Jones, Loyd and Co., in the name of her son, Robert Birch, an only son of a former marriage. They gave her an accountable receipt in Robert Birch's name, bearing interest, which she kept. Robert Birch was then about twelve years old. Calland soon discovered the deposit with the bank, and demanded the money from them; on their refusal to pay it, this action was brought. The plaintiff succeeded.

It is almost unnecessary to point out that this was before the days of the Married Women's Property Act.

The Court thought that the title to the money had been clearly in the father, and the bank was bound to Robert Birch by no contract with him. Therefore, having received notice from Calland that the note deposited was his, the bank had no defence. Or, rather, "The case set up by the defendants is answered by this, that there is no contract to bind them. The wife was not the agent of her husband, nor had she any right to make a deposit for the infant, who could give her no authority." Baron

Alderson remarked: "If the money had been received by the defendants under a contract, I am not prepared to say that the plaintiff could recover; but, in truth, there is no contract with the defendants on behalf of Birch." CHAP. VII.

The Court looked upon this as a case of the bank attempting on behalf of a nominal customer, to set up against the real owner of money which it had received a *Jus tertii*, where there was no *Jus*, for Birch, they held, had no right.

It would follow, on principle, that the bank, without waiting to defend an action by Calland, could, having discovered the facts, have paid him upon demand; and afterwards, if Birch should bring an action against the bank, its answer to him would not be so much the setting up against him of the right of Calland, as the denial of all obligation to him, on the ground that it had made no such contract, whether express or implied.

In *Tassell v. Cooper*, 1850, a set of facts arose which illustrate most aptly the banking relation.

In the years 1843, 1844, William Tassell, a practical farmer, and one Palmer were tenants of a large farm at Penshurst, in Kent, belonging to Lord De L'isle and Dudley; and during this tenancy Tassell opened an account *in his own name* with the London and County Joint Stock Banking Company at their branch bank at Tunbridge, in Kent. This account continued until the occurrences which gave rise to this action, and it was carried on in the usual manner between banker and customer.

In 1844 Tassell and Palmer ceased to be tenants; and Tassell then entered into the service of Lord De L'isle as his farming bailiff; in the course of that employment he had the management of the farm as bailiff, and the sale of its produce, and received sums of money for sale of crops, &c., and paid various charges and outgoings of the farm. He paid into the banking account many of

Account of a
fraudulent
agent.
9 C.B., 509.

CHAP. VII. the sums received on account of Lord De L'isle in this way, and also money belonging to himself and others; and he made payments from the account on behalf of his master, and also on behalf of himself for his private affairs and for others. All the cheques drawn by Tassell and paid by the bank were signed in his own name only, and the account and the pass-book were in Tassell's name.

Towards the end of 1846, Lord De L'isle became dissatisfied with the state of the accounts between himself and Tassell. On the 11th January, 1847, through Mr. Glendinning, he told Tassell not to deal any more with his (De L'isle's) property, but to confine his services to giving orders to the men and seeing that they did their work. At this time Tassell's bank account was in credit £18 8s. 9d., and remained so till the 19th, when he paid in a cheque received that day from the firm of Vines and Tomlin, in payment for wheat of Lord De L'isle's, which they had been employed by Tassell in December to sell; this was credited next day—amount £180 4s. 8d. There were no further credits; cheques drawn in the next few days, and paid, reduced the credit balance to £128 1s. 10d. Afterwards the bank refused to pay two cheques drawn on the account, and returned them with the answer, “refer to drawer.”

About that time Lord De L'isle went with Mr. Glendinning to the Tunbridge branch bank, and applied to inspect Tassell's account. This the manager refused. Lord De L'isle thereupon applied to head office, and thereafter was allowed to inspect the account. Having seen it, he served the bank with a written notice to hold the balance at credit of the account until further correspondence, it being formed of money belonging to him, and he gave the bank an indemnity. It was in consequence of the notice that the cheques were dishonoured. Until receipt of this notice the bank had no knowledge that Lord De L'isle had any concern with Tassell's account.

The real balance due by Tassell to Lord De L'isle CHAP. VII.
was greatly in excess of the balance of the bank account.

Tassell brought two actions against Cooper, who was the public officer of the bank. The first was an action of debt for the balance of his account, £128 ls. 10d.; and he won this. The second contained two counts.

- (1) For wrongful dishonour of those two cheques; and he won this.
- (2) For wrongfully and injuriously exposing the state and particulars of plaintiff's account to Lord De L'isle and Dudley: but, in respect of this count, the Judges thought, without actually deciding the point, that no cause of action was disclosed. The topic of secrecy is further dealt with, page 103.

The circumstances of the case are peculiar, and leave room for further questions; for the Court did not decide whether it was a criminal act on the part of Tassell to receive this cheque and pay it to his own bank account or not, nor did the Court lay down whether legality of possession or otherwise of the cheque by Tassell would make any difference.

Maule, J., thought it "quite clear that the account in question is a banking account of the ordinary kind by the plaintiff on his own account with the London and Joint Stock Banking Company; and that it is not competent to any third party to interpose, and to say that the banking company in reality contracted with him. . . . As between these parties, it seems to me that the cheque was the property of the plaintiff. *But, at all events, after it was turned into money, the bankers were indebted to him** . . . and became liable to account for it whenever he chose to call for it."

* Italics are the Author's.

CHAP. VII.

All three Judges expressed themselves by no means clear that Tassell had no authority to receive this cheque; true, his authority to deal with his master's property had been cancelled, but he might very well suppose he had authority to complete transactions already entered into.

This case possesses an additional interest by reason that the circumstances under which Tassell obtained his bank balance lie upon the verge of criminality. At least two cases in Australia have been decided where the creditor upon current account was a convicted criminal, having been convicted of a crime by means of which he obtained possession of vouchers, cheques, or cash, which were the foundation of his credit balance. The first of these was a Victorian case, *Healey v. Bank of New South Wales* (1899).

Accounts
of convicted
criminals.

(1) *Healey v. Bank N.S.W.* 24 V.L.R. pp. 405, 694. *Healey v. Bank of New South Wales* was an action claiming a certain sum of money alleged to have been lent to the bank, the money having been paid into Healey's account when it was opened with the bank in Melbourne. Much of a long interval between the deposit of the money and making this claim had been spent by Healey in gaol. The bank in its defence set up that, prior to opening this account, Healey had conspired with two other men to cheat and defraud the Government of New South Wales of large sums of money belonging to the Crown, and that the money deposited was the same money, or part of the same money, of which he had, by the conspiracy, cheated the Government of New South Wales; and that, in July, 1893, he was duly convicted and sentenced in New South Wales.

An application to disallow these grounds of defence failed, and at the trial the Judge decided that the allegations of the defence were true, and that the plaintiff's bank balance was derived from money the proceeds of thieving operations by Healey and others upon the Government Savings Bank of New South Wales. Judgment

was given for the bank. An appeal by Healey to the Full Court in Victoria was unsuccessful; and the Privy Council made short work of the case when it reached them, remarking that a more audacious thing than that a man who had undergone punishment for his crime should bring an action to recover the moneys which were the proceeds of the offence for which he had been convicted, could not be conceived. CHAP. VII.
Not reported.

As an illustration of banking law, the case is a little inadequate, because the points determined on appeal related mainly to procedure, and the right of the bank to hand over money equal to the balance of account, and charge it against Healey's deposit, was imperfectly challenged, and apparently the facts of Healy's claim imperfectly established.

Very curiously, a set of facts almost precisely similar arose in Sydney within two years, and resulted in the case of *Zeeb v. Bank of New South Wales* (1901). This time the case was so managed as to force more directly under notice of the Court the relation of banker and customer. As before, the case was part of the fruit of a conspiracy to defraud. The nature of the conspiracy was that Zeeb and others laid their heads together to discover and give information to the Government of an illicit still; really, it was a bogus illicit still of their own manufacture. They compassed, and assisted in, the seizure by the police, and drew the reward, part of the proceeds of which became Zeeb's bank balance in this case. (2) *Zeeb v. Bank N.S.W.*
1 S.R. (N.S.W.) 167.

Later, the Crown discovered the deception, prosecuted the conspirators, and Zeeb, at any rate, was convicted. Ultimately Zeeb regained his liberty, and drew a cheque for £16, which was dishonoured. He thereupon sued the bank. The bank defended, upon the ground that the plaintiff, with others, defrauded the Government of large sums of money, and in particular of a sum of £50, by a false pretence (giving an account of the fraud in Nature of
defence.

CHAP. VII. regard to the illicit still), by which fraud he obtained the sum of £50, and paid a sum of £30, part of the £50, into the bank account, and then was convicted, and after the conviction the Government demanded, and the bank paid, £18 10s., being the amount then to plaintiff's credit.

Defence
allowed.

It was objected that this defence was no answer in law to Zeeb's action. The defence was allowed and proved, and decision, on appeal to the Supreme Court, was given for the bank.

Remarks on
Zeeb v. Bank
N.S. W.

The justice of the result is beyond doubt. But the manner in which things were straightened out, both by the bank and by the Court, leaves some room for question.

It should be noticed that the £30 was not actually and physically part of the £50 reward; if the reward illegally obtained was paid by cheque, then the £30 can only have been part of the proceeds. Again, the £18 10s. was not part of the £30; it was a mere debt, part of the bank's debt of £30 which arose in respect of the deposit. To speak of Zeeb's current account credit balance of £18 10s. as part of the original £50, or even as part of £30 deposited, is to take a money-box view of banking, which appears to have confused thought in the case. It could truly be spoken of as part of the £30 credit obtained by Zeeb in exchange for his deposit.

A further complication in the case was introduced by the fact that when the Government paid Zeeb £50, they intended to, and did, give him title to it, and he was for a time in position to transfer the cheque or money to others; and any person who dealt with him, exchanging that cheque or those moneys in good faith, got a good and indefeasible title to the cheque or cash. Later on, the Government, having found out the fraud, disaffirmed, as it legally might, its transaction with Zeeb. It was then entitled to have the £50 back from Zeeb, if still in his possession; but could not follow the money and claim it from honest holders for value; therefore, even if the £50

itself had been deposited, the Government had no direct right against the bank—not, at any rate, after the bank had turned the voucher into money or passed it through its exchanges. CHAP. VII.

In the alternative, if Zeeb had already parted with the £50 (which was the case), the Government was entitled to strip him of its proceeds. Part of the proceeds, which the Government actually discovered, was Zeeb's credit with the bank of £18 10s. To claim this was to recognise the fact of Zeeb's contract with the bank. It would seem, therefore, that, before paying the Government upon its direct demand, the bank might have claimed that the money could only be paid over in satisfaction of the contract with Zeeb, and have demanded legal proof of the Government's title to stand in Zeeb's shoes and collect his debts, something in the way that it does when an executor comes and claims the balance of a deceased customer, or an official assignee the balance of a bankrupt.

Such a means of furnishing a proof of its right was open to the Government. For, upon conviction of Zeeb, an order might have been obtained from the Court for restitution of the property which Zeeb had fraudulently obtained, and the meaning of property in this order would include a bank balance into which money (or goods) obtained by crime had been converted. The safe plan would seem to be for a bank in such a case to call for an order of the Court of this kind. If the party claiming the account cannot obtain such an order, nor any legal documentary proof of his title that might furnish a reason why the bank should not pay over, but respect the customer's contract.

In the case in question the fullest advantage was taken by Zeeb's counsel of his contractual rights against the bank. But these technicalities were swept aside by a Court of three Judges, each of whom, upon diverse reasons, found in favour of the bank. The part of the

Crimes Act,
1900, s. 438,
and cf. Queen
v. JJ. of
Central
Criminal
Court, 1886,
17 Q.B.D.
598.

CHAP. VII. decision which seems most useful in principle is that it would be against public policy, *contra bonos mores*, to allow convicted felons to enforce actions at law, which, if successful, would secure to them the fruit of their crimes. So far as it goes, the decision in *Healey v. Bank of New South Wales* by the Privy Council, based as it appears to have been upon the audacity of the action, seems to have proceeded from a like principle: that decision is nowhere reported, though it is referred to in Cf. Paget, p. 6. Hart on Banking and by Paget.

Interpleader.—Where two parties each claim property which is in the hands of another, and one of them has commenced an action to recover from the holder the property thus claimed, the law allows a very convenient remedy by way of interpleader: that is, the party sued may apply to the Court, stating the facts, giving particulars of the other claim, and stating that he himself has no claim, and is ready to bring the property into Court or hand it over, as the Court may direct. Under these circumstances, the holder is allowed to step out of the action, and the two claimants are ordered to fight it out.

Extent of
remedy.

There are many cases where relief by way of interpleader would be very useful to banks, provided it is open to them. Courts have sometimes granted such relief in the case of documents or other chattels held by a bank; but no case is reported where such relief has been granted to a bank in respect of balances due on current account, and such a course would seem to be inconsistent with the rule that a banker shall not set up against his customer a *Jus tertii*. On this point Sir John Paget remarks, "It is a salutary rule of banking practice that the banker should not question the title of his customer or be bound to look beyond him. . . . On the other hand, it would be altogether improper that a man should be able to put money beyond the reach of his creditors by merely bank-

ing it under an assumed name, with or without the concurrence of the banker." CHAP. VII.

The Act which in New South Wales governs Inter- In N.S.W. pleader matters leaves it to the discretion of Judges to apply or refuse the relief asked for, and the Act in express words includes actions of debt among the cases where the defendant may apply to the Court; but Courts, in granting relief, have been much influenced by a former rule in Equity, under which the application was refused whenever it was apparent that the applicant was under a special obligation to one of the parties—the case of banker and customer being such a special relation.

The difficulty lies in this—that there is nothing tan- Generally. gible to hand over; what was deposited has now become the property of the bank, and mixed with its funds, or been exchanged for value. By admitting that a balance exists, the bank inferentially admits a contract of a confidential and special nature with its customer; to be willing to account for that contract to a stranger, or as the Court may order, would indicate a disregard of contractual rights altogether inconsistent with the policy and spirit of the law. It may be observed, too, that, from another point of view, banking may be regarded as a form of employment: in old Digests banking cases are sometimes indexed as special instances of the relation of master and servant. Now possession by the servant is possession by the master, and the law does not allow, unless in most exceptional cases, a servant to deny his master's property in things entrusted to him.

Debtors other than bankers who have asked leave to interplead have been refused.

Since a fixed deposit after it has become due is—like In case of
a current account credit balance—a debt payable to the F.D.R.
depositor's order (though the method of drawing may be different), it would seem on principle that a bank could not set up a *Jus tertii* against its fixed depositor, nor be

CHAP. VII. allowed to interplead if threatened with actions by both the fixed depositor and another claimant.

(1880) 1
N.S.W.L.R.
97.

In an Irish case, leave was refused to a bank that applied for relief by interpleader in the case of two claims upon deposit receipts arising out of the same transaction. But in New South Wales, in the case of *McGuinness v. Bank of New South Wales, Cherry and others claimants*, interpleader was allowed; that was a case where the daughter of a South Australian bankrupt lodged money on fixed deposit, £1,250 for six months, in Sydney. The claimants were the official assignees of the bankrupt. The plaintiff herself had been, almost immediately after the deposit, convicted in Adelaide of conspiring with others to obtain and obtaining certain goods by false pretences. She denied that the moneys deposited formed any part of the estate of Abraham McGuinness, her father. The facts are not fully reported, but it may be remarked that this case seems to have afforded stronger justification for the bank than did Zeeb's case (*ante*, p. 95), for the money lodged with the bank was probably the property of the official assignee at the time of its deposit. It has, however, been doubted.

In Victoria.

In a Victorian case (*McDonald v. Bank of Victoria*, A.R., 29 Mar., 1859), where a Judge gave leave to a bank to interplead in respect of two adverse claims to a sum deposited by a deceased customer, the order was rescinded upon appeal.

Interpleader
allowed in
case of an
account
abandoned by
the customer
and claimed
by rival
creditors
under
different
titles.

In a case recently decided in England, a company (C) had a current account in credit to the extent of £166 5s. 3d. with the Commercial Bank of Scotland. C was in difficulties, and B sued C for £96 1s. 4d., amount of salary due as secretary, and got judgment for this amount, with costs £2 2s., amounting in all to £98 3s. 4d. To enforce this judgment, he obtained and served a garnishee order upon the bank in respect of the balance due on current account. The garnishee order was made abso-

lute; but before the bankers paid the money, another creditor, A, interposed. A was a secured creditor holding a debenture, granted by the company some time previously, which created a charge over all the property for the time being of the company by way of floating security. By virtue of this security, A had a receiver appointed, who claimed the bank balance before it had been paid under the garnishee order. The bank was allowed to bring the money into Court, and an interpleader issue directed between A and B, when A was held to have the better claim. In this case it should be noticed there was no denial of its customer's claim by the bank, and both claimants derived their rights from the customer.

CHAP. VII.
Cairney v.
Back, 22
T.L.R. 776.

Involuntary Alienation of Bank Balances.—It must not be supposed because a bank's duty is, first, to legally fulfil its own contracts, there is no legal means of obtaining the balance of an account for the parties justly entitled to it. Thus, in all cases of larceny and similar crime, if when convicted there is a bank balance remaining to the credit of the thief, which can be shown to be built up of the proceeds of the property stolen, then its restitution to the rightful owner can be ordered by the Court, and the bank must pay on such order.

It Restitution
under
Crimes Act.
Ante, p. 97.

And in the case of a bank balance which, though not in the name of the bankrupt, belongs in right to a bankrupt estate, the official assignee can apply for, and obtain, a declaration that the account belongs to the bankrupt estate, whereon the right to the account would pass to the official assignee. In a case where the assignee of a bankrupt husband obtained from a Court a declaration of his right to an account which stood in the name of the bankrupt's wife, the bank was held justified, on the ground of contract, in paying cheques of the wife between the dates of the receiving order and the declaration of assignee's right.

Declaration of
Bankruptcy
Court.

In re Mon-
tagu, ex p.
Ward, 1897,
76 L.T. 263.
Cf. post, p.
106
(ostensible
heading).

Again, since bank balances are debts, they can be

Garnishee
order.

CHAP. VII. taken in execution to satisfy a judgment obtained by any stranger to the bank against its customer. This is effected by means of a garnishee order, which, when served upon the banker, acts to tie up the whole of that customer's credit balance at date of service, and cheques presented while the order remains in force, even though issued before the service of the order, should not thereafter be paid. But the bank may open a new account if desired.

Rogers v.
Whiteley,
1892, A.C. 118
Yates v.
Terry, 1901,
1 Q.B. 102.

Order of
Equity Court.

Injunction to
depositor.

In the case of a fraudulent trustee or partner or agent, there is in principle no reason why, in a proper case, the Equity Court should not grant an injunction to the bank to prohibit it from paying any further cheques of the party called to account; a lesser step is, as a rule, sufficient: the injunction is directed to the nominal customer, and the bank informed of its existence. Ultimately the injunction will be removed, when the account may again be operated as usual, or an order of Court will effect the necessary transfer of the balance to its proper owner. If the nominal customer refused to sign a cheque for this purpose, that might, according to the form of decree, be contempt of Court, and severely punishable; moreover, the Court would not allow any such obstinacy to defeat it: if necessary, the Court would appoint someone to sign for the depositor.

CHAPTER VIII.

DISCLOSING THE ACCOUNT.

As has been seen (*ante*, p. 93) in *Tassell v. Cooper*, CHAP. VIII.
the question was raised whether the customer of a bank
had a right to absolute secrecy towards strangers, and the
Court, without deciding the point, thought there was no
such duty.

In this consideration, two points are especially worth
notice:—

- (1) It is customary with banks to bind their
officers to secrecy; this duty becomes a term
of each officer's employment: he would be
liable to instant dismissal for any serious
breach of it. But the customer does not by
this gain any rights; it may be only a matter
of prudent management.
- (2) In the ordinary law of contracts there is no
implied duty of secrecy. A person may talk
about his business, including contracts, as
much as suits him.

It is usual for banks to be very discreet with regard
to their customer's affairs, but unless it could be proved
to be a customary part of the ordinary duty of banks to
preserve an absolute secrecy with regard to customers' Absolute
secrecy not
yet held to be
imposed by
law or
custom.
accounts, the depositor could not claim complete secrecy
as a right.

Up to the present, in no reported case has any such
absolute duty been proved. The decisions are as fol-
lows:—

CHAP. VIII.

Foster v.
Bank of
London,
3 F. & F.
214.

In 1862 Mr. Foster sued the Bank of London for a breach of duty in disclosing his account under these circumstances:—A member of a firm, creditors of Foster, went to the bank with a cheque of Foster's for £250, and a bill for £198; these creditors were Perederoos and Co., and they were customers of the same bank. The manager was seen and asked the state of Foster's account; this was answered. The manager was then asked whether, if Perederoos and Co. paid in £104, the cheque and bill could be paid; reply, they would be paid. The bill and cheque were presented, and paid that day; and a cheque of the firm for £104, dated the next day, was, on the next day, paid to Foster's credit, but credited by the bank as for the preceding day.

The Chief Justice, who tried the case before a jury, thought the bank could not go further than to say, "Not sufficient assets," and the jury unanimously expressed themselves to the same effect. The Chief Justice said: "That is, the jury are of opinion that it is the duty of a banker to in no way disclose the state of his customer's account?" To which the jury said they were. Verdict for plaintiff for £432.

The case of *Tassell v. Cooper* has already been referred to, p. 93.

Hardy v.
Veasey, L.R.
3 Exch. 107.

The cases of *Tassell v. Cooper* and *Foster v. Bank of London* were both brought before the notice of the Court in 1868, when a customer sued his banker for damages said to be occasioned by disclosing his account without justifiable cause.

The duty which the plaintiff alleged was, that the bank should not disclose his account except on a reasonable or proper occasion. The Court, having regard to the course the case had taken, did not find it necessary to decide definitely that such a duty existed, but held that, assuming the duty to exist, it was properly left to the jury to decide as a question of fact whether the disclosure

had been upon a reasonable and proper occasion. It was pointed out that in *Foster v. the Bank of London* the grievance lay, not so much in disclosure of the account, as in a trick by which the bank conspired with one of the plaintiff's creditors, to the prejudice of the rest. CHAP. VIII.
Supra.

There is no later case directly in point. Text-book writers incline to the existence of such a duty. Sir John Paget puts it as "morally, and probably legally," an obligation of the bank. Paget, p. 4.

Grant, basing his opinion on the case just referred to, says:—"It appears to be doubtful whether, by virtue of the relation of banker and customer, any legal duty is imposed on the banker not to disclose his customer's account except upon a reasonable and proper occasion, so as to give a cause of action without special damage; or whether the banker's duty is not merely a duty not to act to the prejudice of his customer, requiring special damage to make a breach of the duty actionable. But, assuming the existence of a legal duty on a banker not to disclose his customer's account, except upon a reasonable and proper occasion, the question of whether the disclosure was made on such an occasion is a question to be left to the jury."

There is a section in the Evidence Act, 1890, of the State of Victoria to the effect that no bank shall be compellable to produce the ledgers or other account books in any legal proceedings unless a Judge specially orders production. And similar statutes are in force in the other States. Under
Evidence
Act.

Under this section there was recently an application to a Judge in Melbourne for an order directing the Bank of Australasia to produce its books at a trial; the object being to bring out at the trial the particulars of the account of one Barlow, who had sold wheat to both the parties concerned in the action. This Barlow had received money from both, but the wheat was delivered to 1903, Argus
L.R.C.N. 41.

CHAP. VIII. one only. Some of the money paid had been passed through the account sought to be discovered: Mr. Barlow had absconded. The bank was unwilling to supply verified copies of his account, *on the ground that it was not justified in disclosing its client's affairs*; though it was willing to have verified copies in Court when the time came, so that they might be used in Court if the Judge so directed. Owing to a technical difficulty, this would not meet the case, as the necessary notice to make the copies available in evidence could not be given; an order was therefore made enabling the applicant to have the originals in Court.

The position taken by the bank in this matter recognises some obligation of secrecy. The bank's course was clearly right and wise; it was much safer to leave all responsibility in the hands of the Court: it is in very rare cases that a Court would order disclosure of the accounts of a third party.

Ostensible
heading.

If the account which is sought to be discovered be really and substantially the account of one of the parties to an action, though nominally the account of some third party, there is reason to suppose the Court would be more liberal in assisting an applicant to obtain discovery; that is, the Courts will, for purposes of the Evidence Act, go behind the ostensible heading of the account. This, it may be noticed, is entirely consistent with the jurisdiction of Bankruptcy Courts to reach the bankrupt's credits and moneys, under whatever name they may be hidden.

Sth.
Staffordshire
Tr. Co. v.
Ebbamith.
1895, 2 Q.B.
669.
Pollock v.
Garle, 1898,
1 Ch., 1.

CHAPTER IX.

MONEY—CURRENCY—COINAGE—PAPER MONEY —IDENTIFICATION OF MONEY—RESTITUTION OF STOLEN MONEY.

As a preliminary to the investigation of the term CHAP. IX. “money” and its nature, scope, and legal incidents, a couple of statutory definitions may be referred to.

In the Crimes Act, “money” includes all coined No. 40, 1900,
s. 4. money, whether current within New South Wales or not, and all bank notes or instruments ordinarily so called, if current as such, and payable to the bearer.

This definition, like statutory definitions of “banker,” has the defect (for definition purposes) of involving the use of the word sought to be defined.

In the Truck Act, “money” means coin of the realm No. 55, 1900,
s. 12. of Great Britain and Ireland current in New South Wales, and includes postal notes, post office orders, and the notes of any joint stock bank or association carrying on the business of a banker in New South Wales under the authority of any charter issued or granted by the Crown and actually in force, or under any Imperial Act or any Act of the Legislature of the said Colony now or hereafter in force.

This is a good definition, as it requires to be, for the Truck Act is one for the benefit of workmen and others, requiring employers to pay them their wages in full in money, and not make them take goods in part payment; and restricting the class of deductions that can be legally made from wages.

CHAP. IX.

Currency — Historical.— The subject of currency may be conveniently introduced by an extract from "Chalmers' Colonial Currency." Mr. Chalmers says: "There is a marked parallel between the early history of the currency of the senior Australian colony and that of the plantations in the new world some two centuries previously. In the first years of New South Wales, as of the American and West Indian plantations, there was a dearth of coin; exchange was by barter; when coin did begin to flow into the colony it was foreign, not sterling coin, and this foreign coin (which here, as in the new world, was the Spanish dollar) was overrated in terms of sterling, and so originated a system of 'denominational currency,' comparable in all respects with the 'currency' systems of the older colonies of the new world. The chief difference lies in the prevalence of private promissory notes in the early years of New South Wales."

"The currency history of the Colony may conveniently be divided into four periods; the first extending from its foundation in 1788 to 1822; the second, from 1822 to 1829; the third, from 1829 to 1851; and the fourth, from 1851 to the present day. The first period was an age of barter and tokens; the second period was marked by the supremacy of the Spanish dollar as the actual standard and measure of value; the third saw the substitution of a sterling standard; and the fourth began with the discovery of gold in Australia, and is characterised by the establishment of a branch of the Royal Mint at Sydney."

The Course of Legislation.— From this *résumé* it will be seen that during the first sixty years of Australian history there was no Mint in this country, and at first a paucity of English coin—facts which led at one time to the general use in Sydney of Spanish dollars as money, together with a nondescript coinage embracing various forms of token money. At that time, owing to the greater relative importance of South America and the

Philippines, and of Spain herself, Spanish dollars were the most usual standard of value in the southern parts of the world. CHAP. IX.

But in the year 1826 an Act was passed to do away with this state of things, and to promote the circulation of sterling money of Great Britain in New South Wales. By this Act an earlier Act—which had made promissory notes and bills payable in Spanish dollars available as if such notes and bills had been drawn payable in sterling money of the realm—was repealed, and its sanction withdrawn, except as to notes and bills already drawn and issued.

It was enacted that 4s. 4d. sterling should be legal tender for a Spanish dollar, and that British copper money should be a legal tender for its proportion of silver, no person to be compelled to accept more than twelve pence of copper money in one payment.

So far as this Act is concerned, there was no provision as to the limit of a legal tender of payment in silver coin.

A further provision of the Act rendered all negotiable or transferable bills, promissory notes, orders, drafts, or undertakings in writing for the payment of any sum of money less than 20s. sterling, which should be made or issued after the publication of the Act, absolutely void and of no effect, any law or custom or usage to the contrary notwithstanding.

And the issue or negotiation of such documents was subjected to a heavy penalty—£5 to £20. It may interest you to know that such a penalty, if recovered, would by law have been paid over to a fund to prevent the harbouring of runaway convicts and the encouragement of convicts tippling or gambling. This provision remained in force until 1887, when it was repealed by the Bills of Exchange Act.

CHAP. IX.

Although, looking at present-day practice, the provision seems very extraordinary, it must be remembered that similar restrictions prevailed in England and in Victoria until the Bills of Exchange Act; and in Scotland they still exist.

The Law now in Force—Coinage.— The next Act dealing with this subject in New South Wales was passed in 1855. By it the gold coin *issued from Her Majesty's Mint in London and from the Branch of the Royal Mint in Sydney* (which had meanwhile been established here*) are declared to be *the only legal tender for payments within the Colony of New South Wales*. This is subject to a provision as to the weight and fineness of the coins, and to the next section of the Act, which makes a tender of payment of money in silver coin of the Royal Mint at London, or the Sydney branch, good legal tender for any sum up to 40 shillings, and no more. Under this statute, it will be observed the gold coin minted at the Melbourne and Perth branches of the Royal Mint, which were not then established, is not legal tender in New South Wales, and one would suppose such coin cannot become so until an amending or repealing Act is passed. If this be so, it is, of course, a highly anomalous state of affairs. Very often, of course, there is a practical business way out of any such difficulty which settles the matter so that legal methods are quite unnecessary. Now, in the language of Professor Walker, "Money is that money does," and Melbourne minted sovereigns perform the function of money just as well as those made in Sydney, and are as hard to come by; in practice they are almost indistinguishable; and they are, with the sovereigns from the other branch Mints, English sterling money all over the world.

English law
as to coinage
applied in
Australia.

It may be that this apparent vacuum in the New South Wales statute law on the subject is rendered of no effect by proclamations under the Imperial Coinage Act

* Though permanent provision was first made in 1865.

of 1870, and prior to that under the Colonial Branch Mints Act of 1866. The precise legal effect of such proclamations and their capacity to override a definite statute of this State in its own Courts raises a delicate constitutional question into which I do not propose to digress at present. Such a discussion could hardly be of more than academic interest, especially in view of the Commonwealth of Australia Constitution Act, to which I shall presently refer.

There is a Sydney Mint Act, but it does not bear immediately on the question, as its function is to provide ways and means for the support in Sydney of the Sydney branch of the Royal Mint; it also enacts that sums received by the branch for fees or charges shall go to the consolidated revenue fund of the State.

In point of government and in all except financial arrangements, the Sydney Mint is one with His Majesty's Royal Mint in London, of which it is simply a branch.

By a Royal proclamation made under the Currency Act of 1870, sections 1-7, 11, 18, 20, and the schedules of that Act, as amended by section 2 and schedule of the Coinage Act, 1891, are declared to be applied to and to be in force in New South Wales and the other Australian Colonies. *Proclamation, August 1, 1896, promulgated in New South Wales by proclamation, November 16, 1898.* (See "*Government Gazette*," No. 991, of November 18, 1898.)

Section 4 of that Act is as follows:—"A tender of payment of money, if made in coins which have been *issued by the Mint** in accordance with the provisions of this Act, and have not been called in by any proclamation made in pursuance of this Act, and have not become diminished in weight by wear or otherwise so as to be of less weight than the current weight, that is to say, than the weight (if any) specified as the least current weight in

* Mint here means His Majesty's Royal Mint in England.

CHAP. IX. the first schedule to this Act or less than such weight, as may be declared by any proclamation made in pursuance of this Act, shall be a legal tender—in the case of gold coins for a payment of any amount; in the case of silver coins for the payment of an amount not exceeding forty shillings, but for no greater amount; in the case of bronze coins for a payment of an amount not exceeding one shilling, but for no greater amount. Nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender."

By a later Royal proclamation, also under the Currency Act, 1870, known as the "Sydney Mint Proclamation, 1900," made 17th September, 1900 (copies printed in Sydney by the Government Printer, X71600A): "The gold coins coined in pursuance of this proclamation at the Sydney Branch Mint shall be deemed to have been issued from Our Mint, and shall be current and a legal tender in like manner and to the like extent as if they had been coined and issued in England."

No doubt similar proclamations dealing with the other colonial branch Mints in a similar fashion make, under the authority of English coinage statutes, all the gold coins issued from the various branch Mints legal tender throughout the Empire, to the same extent as though struck and issued in London. And in actual business the real soundness of the coinage at whatever branch of the Mint it may have been struck, has always been such as to obviate the raising of any difficult questions upon its use as legal tender.

Paper Money.—Bank notes are not legal tender, but a valid tender of payment may be made with them unless they are objected to on the ground that they are not cash. In the same way a valid tender of payment may be made by offering a cheque; and if the creditor do not object to it on the ground that it is not cash, he is to be taken as having waived any objection to the cheque as tender in point of form.

Nevertheless, bank notes are a part of the currency CHAP. IX.
of this country, for "currency" is a more extensive term than "legal tender," and coincides rather with the term "money" as defined by Professor Walker in his work on "Money, Trade, and Industry." At any rate, bank notes are so largely used as money in this country that any review of the currency, whether on its legal or its more practical side, would be strangely inadequate without some account of them.

Bank notes may be defined as promissory notes issued by a bank payable to bearer on demand, and intended to circulate as money: and, as such, come within the provisions of the Bills of Exchange Act. It is their use in circulating as money that distinguishes them from other forms of negotiable paper, such as cheques, which are not issued with such intention, but with a view of settling debts, either in the simple way of being cashed by the creditor, or in what is now the more usual method, viz., an exchange of credit, for that is what the plan of placing cheques to one's credit with a banker and leaving them to be collected by him really amounts to.

Bank notes
and cf. post
pp. 126-129.

In New South Wales, bank notes are not separately taxed with a stamp duty, as is the case of other instruments of credit; but each bank, having a note issue, pays to the Government, in accordance with the Stamp Act, a composition fee of £2 per cent. per annum on the amount of its notes in circulation as ascertained by the quarterly averages.

There is no limit placed by law upon the issue of notes by the banks of this country (though a bank may have a limit to its issue by the terms of its own constitution), but by the Companies Act, section 170 (1) "no banking company claiming to issue notes shall be entitled to limit liability in respect of such issue, but such company shall continue subject to unlimited liability in respect thereof." And by subsection (3), "the members

In case of
banks
registered
under
Companies
Act.

CHAP. IX. of such company shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company."

Practically, the amount in circulation is limited by the limits of effective demand and the amount upon which it is profitable to pay a £2 tax to the Crown.

Protection of the Currency.—The coinage, once established, is protected by the operation of the Crimes Act, part VI. of which deals, in a series of twenty-seven sections with great elaboration, with the various offences of counterfeiting, impairing, or defacing coin; and of possessing or uttering any counterfeit coin, or any coin which has been impaired or defaced; and of gilding coin; and of buying or selling counterfeit coin, or of importing it; and of conveying tools out of the Mint, &c., &c.

The punishments which may be awarded those convicted of any of these offences are very heavy, and in the most serious cases penal servitude for fourteen years may be awarded.

The sections of the Coinage Act of 1870, already referred to, have some protective effect, especially sections 5 and 7. The Crimes Act also protects the paper currency by the operations of sections 265-270, which impose heavy penalties for forgery of bank notes or unlawfully engraving plates for making bank notes, and kindred offences.

Currency of the Commonwealth.—Two sections of the Commonwealth of Australia Constitution Act have an important bearing on the future currency of the country. By section 115 "a State shall not coin money nor make anything but gold and silver coin a legal tender in payment of debts," and by section 51 among the powers conferred upon the Federal Parliament is the right to legislate upon questions of currency, coinage, and legal

tender for the whole of Australia. This power, however, CHAP. IX. has not, as yet, been exercised.

Case Law—I think I have now outlined to you the chief features of the statute law so far as it deals with the currency. Case law on the subject, however, remains to be considered. The leading case is that of *Miller v. Race*, which has been summarised as follows:—^{1 Burr. 452, also Sm. L.C.}

One December night, about the middle of the eighteenth century, the mail from London to the west was attacked by highwaymen. Amongst other things taken was a bank note for £21 10s., which a Mr. Finney, of London, was sending down by the general post to a client in Oxfordshire. The next day the news of the disaster reached the ears of Mr. Finney, who rushed off immediately to the bank and stopped payment of the note. A few days afterwards the plaintiff, who had come by the note quite honestly, and had given value for it, presented it at the bank; but Mr. Race, one of the bank clerks, not only refused to cash it, but even to hand it back. Miller therefore sued him, and succeeded in making him cash it.

There is another matter that should be made clear before going into details. I have already mentioned it; it is the quality of *negotiability* which attaches to all bills of exchange.

The term “bills of exchange” includes bank notes, cheques, drafts, and promissory notes. All these, and some other documents are, in their nature, *negotiable*.

Being negotiable, they have a quality which non-negotiable documents and other goods and chattels do not possess—that is, that the transferrer can give the transferee a better title than he himself possesses. I have said this is not an attribute of other forms of personal property. If a man—a thief, for instance—having no title to a watch, sells it to someone else, that other person, however innocent, can acquire by the purchase no

CHAP. IX. title to the watch, for the person from whom he got it had no title. It is otherwise in the case of a bill of exchange. If the holder of such a document have obtained it honestly and for value, he can keep it against the true owner, and enforce payment from those liable upon it. Such a holder has now, in fact, become the true owner. This doctrine of negotiability is no part of the English common law, but has been imported into it from the law merchant, that is, from mercantile custom, which obtained so widely that it was recognised to be binding and have the full force and effect of law. In the case of bank notes, this doctrine was recognised as embodied in our law in the historical case of *Miller v. Race*.

The Currency of Money.—Now, a negotiable instrument has been defined as “an instrument which, upon delivery, transfers the legal right to the property secured by it to the person to whom it is delivered.” Since this quality of negotiability is firmly attached to paper money, and also to paper securities and credits, which are less exchanged than money, one would suppose *a fortiori* that all money must be negotiable, or have some similar characteristic; and, indeed, that is the law and the ground upon which the leading case was decided; the passage of Lord Mansfield’s judgment, which I proceed to quote, for its general importance, has become classic among both lawyers and economists.

“Now, they (bank notes) are not goods, not securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash.

“They pass by a will which bequeaths all the testator’s money or cash, and are never considered as securities

for money, but as money itself. Upon Lord Ailesbury's will, £900 in bank notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. CHAP. IX.

“So, on bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

“ ’Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said ‘that the reason why money cannot be followed is because it has no earmark,’ but this is not true. The true reason is, upon account of the currency of it, it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but, before money has passed in currency, an action may be brought for the money itself.” But cf. *post*,
p. 120.

A more modern and a very interesting case is that of *Moss v. Hancock*, decided in the Queen's Bench Division in 1899. In that case, one Thomas Neale, a servant, had stolen a £5 gold piece, the property of his master, Hancock. He was convicted, and the magistrates made an order that the coin, which was produced in evidence, should be restored to Hancock, the respondent. The £5 gold piece had been presented to respondent by the committee of the Goldsmiths' Company in 1887, and bore the date of that year. It was always kept by respondent in a case in a cabinet in his drawing-room, and had never been in circulation. Together with other property, it was stolen from Hancock's residence on November 20, 1898. Moss, the appellant, was a dealer in new and second-hand clothes and other articles, and Neale changed 1899,
2 Q.B. 111.

CHAP. IX. the gold piece at Moss's shop for five sovereigns. Moss objected to the order for restitution of the coin, and appealed. The gold piece had been made current coin of the realm by Royal proclamation issued under the Acts of Parliament dealing with the coinage. It was stated in argument the piece was of somewhat greater value than that of its denomination. From all the facts, which were stated for the Court in a special case by the magistrates, the Judges came to the conclusion that this gold piece never passed in currency, though it was the subject of a sale as a medal or curio might have been. The Judgment of Lord Mansfield in *Miller v. Race* was cited, and it was concluded that the question upon which the case should turn was, Whether, by the manner of dealing with it which the thief adopted, the gold piece passed in currency. The exchanging of a coin for other coins (it was said) is not conclusive proof that the exchanging is a dealing with current coin on both sides. Many coins which have not yet been formally withdrawn from currency have a price far beyond their denominated value by reason of their antiquity or rarity, or for their beauty of design or execution. It was held the order for restitution had been properly made.

The two cases quoted, taken together, go to show that bank notes may be currency even though they are not legal tender, and that current coins of the realm are not always currency, though if used as legal tender they could not fail to be so. Also, a consideration of these cases naturally leads to an inquiry as to the law in New South Wales as to orders for restitution of money stolen.

Stolen Money in New South Wales.—We have an enactment in force here, as a section of the Crimes Act, which closely resembles the English section under which the order in *Moss v. Hancock* was made. And in a recent case in Hay, since known as the Hay bank-note case, facts arose which aptly illustrate the law. A stole

No. 40, 1900,
s. 438.

Restitution
of paper
money.

a bank note which belonged to B; he passed it on to C, who took it bona fide and for value, and who passed it on to D, who also took it bona fide and for value. D paid it into the Commercial Bank, by whom it was presented to the Australian Joint Stock Bank, whose note it was. At the time of presentation the fact of the theft, and the number of the note, had become known to both banks; the Australian Joint Stock Bank paid it, and was legally bound to do so. The thief was prosecuted and convicted, and upon application being made the Court ordered restitution of the note to B. The effect of such an order would be to compel the bank to pay the note twice over. A great deal of comment was caused at the time by this order. It is clear, however, that it was not good law. For the third subsection of sec. 438, under which the order was made, provides that, where any valuable security has been paid by some person liable to the payment thereof, or, being a negotiable instrument, has been taken for a valuable consideration without notice or cause to suspect that the same had been dishonestly come by, the Court shall not order such restitution. (Valuable security in this connection includes bills, notes, and cheques.) The case is therefore only used by way of illustration.

CHAP. IX.

Cf. W.N.
cover, Oct.
24th, 1901.

Indeed, the note, having been once legally redeemed by the bank, was no longer an obligation, and was therefore unfitted to be the subject of an order for restitution. This would have been quite clear had the bank at once stamped the note "cancelled." (See an English bank-note case to that effect, *Rex v. Stanton*, 7 C. & P. 431.)

It remains to consider whether restitution can be ordered in New South Wales of coin. If this can be done, it would seem that metallic money is less freely exchangeable than paper money, though the negotiability of paper money is derived from and based upon the law with regard to coin as appears from *Miller v. Race*. Yet this result might easily flow from an accident of the

Of coin.

CHAP. IX. statute law. Literally, a sovereign is an instrument, but the term negotiable instrument has a special meaning embracing a group of certain well-known written documents, so that probably a current coin is not a negotiable instrument within the meaning of the Crimes Act. There is no statutory definition of negotiable instrument in either the Crimes or the Bills of Exchange Act.

Cf. *ante*, p. 115, and *post*, p. 124.

We must, therefore, leave on one side the proviso with regard to negotiable instruments, and refer to the principal subsection of section 438 of the Crimes Act: "(1) Where a person is convicted under this Act of stealing, embezzling, or receiving *property*, the Court may order the restitution thereof in a summary manner to the owner or his representative."

Now, there is no doubt that money is property under this section, and therefore its full and free exchange in currency can only be legally secured to the coinage by some legal doctrine rendering it unfit for restitution; this may be found in the quaint saying, "Money has no earmark."

Money has no earmark.

"It may be that the Legislature did not think it necessary to protect, by including them in the proviso, persons who had, bona fide, taken stolen money, because, in the great majority of cases, it would be impossible, in fact, to identify the money, so that only in rare cases would protection be wanted; but that hardly seems satisfactory. It seems to me that the Legislature must have assumed that persons having, bona fide, taken stolen money did not come within the statute. The matter is very doubtful; but, on the whole, I think the explanation may be thus: it may be that the true meaning of the saying, 'That money has no earmark,' is, that when current coins of the realm have passed, bona fide, from hand to hand as currency and as money, they are considered, for all purposes of property in them, not to be identifiable. . . . The doctrine that money has no earmark,

whatever it means, is undoubtedly a doctrine of our law." CHAP. IX.
(Per Channell, J., in the judgment of *Moss v. Hancock*.)

In *Moss v. Hancock* the Judges thought that stolen money which had subsequently passed in currency as money, and in good faith, could not be made the subject of a restitution order, though they avoided deciding so much.

I have already indicated the view that in describing "Money, Trade and Industry," the currency one should include bank notes, but draw the line at cheques; and for this view I adopt the reasons suggested by Professor Walker, viz., that though, as between the bank and bearer, its note may be a form of credit, still it is not so between the parties who use it as money. As between the buyer and seller of goods, and as between any debtor and creditor, the bank note need not be accepted, but when accepted it is in full payment for commodities, and final discharge of indebtedness; and if the law in exceptional circumstances gives recourse upon the transferrer of the note, this is a legal incident which in practice is never asked for nor looked to. It is otherwise in the case of cheques or any other class of bill of exchange. See *post*, p. 126.

Undoubtedly the saving of labour that is effected in a modern mercantile community by the use of cheques, bills, and promissory notes, is comparable in extent with the work done by actual money, and very much the same in kind. The circulation, both of cheques and paper money, may be spoken of as the life-blood of our commercial system, and if anything happened which put a stop to this circulation, the result would be chaos.

CHAPTER X

BANKERS' DOCUMENTS OF CREDIT—NOTES, DRAFTS, LETTERS OF CREDIT, CIRCULAR NOTES, FIXED DEPOSITS.

CHAP. X.
Dealings in
credit.

It is important to devote some attention to the word "credit." Probably a junior bank clerk would find some difficulty in giving a clear definition of what banking is, if asked to do so, though not without practical knowledge on the point. To completely define banking may be a difficult matter, and many definitions more or less lengthy and more or less adequate have been given, to which there is no need now to refer. The short definition, that banking is a trade in money and credit, is sufficient for the present. And banks' officers, and others, should realise that the company employing them is a trader whose business it is to deal in credit, just as the Colonial Sugar Refining Company is a trader, whose business it is to deal in sugar; and by looking at it in this way, get rid of the idea that it is correct to say that a man has so much money in the bank, or that he puts his money in the bank: these are figures of speech. Of course, we all know really that only the bank itself has money in the bank, and, that its customers who have current accounts in credit, have not any specific money in the bank which can be pointed to as theirs, and which the bank is keeping for them. For when they pay in money, that money is not merely entrusted by them to the bank, but given to the bank to belong to itself in exchange for the credit in account which is thereupon entered to the customer. And what the bank does is, to

receive the money as its own, and mix it at once with other of its own moneys, and to invest it, or part of it, exactly as it pleases, and put by in reserve some such proportion of its own money as is safe and necessary. And in all this the bank is doing simply what it legally and properly ought to do. In making its investments and in determining what quantity of gold to keep, the bank is answerable to no one, the reason being that the money is its own, obtained from customers in exchange for the credit they obtain in account by depositing it. Thus the chief business which is carried on in the banking room is the exchange of money for credit and of credit for money. And there are two chief ways in which the banking company deals in money and credit: the one by giving credit to customers in current account; the other by issuing to its customers documents of credit wherewith cash may be obtained elsewhere, or at a later date, and in a different way than by the drawing of cheques upon the customer's ordinary account. Of the latter kind is the issue of notes, drafts, and letters of credit. With these I have classed fixed deposits, because they are formal written instruments, which the customer as a rule carries away with him, though in most respects they are more in the nature of an account.

Before mentioning the peculiar characteristics of notes, it will be well to make clear some of the features which belong to instruments of this class. In the first place, all these papers, or instruments, are forms of personal property. Personal property has been divided into chattels real and chattels personal. Chattels real are dealt with in the law of real property, and for the present we leave them on one side altogether.

All other personal property is described under the heading, chattels personal, and in this sense the word "chattels," which is almost synonymous with goods, includes forms of property which are intangible, and con-

CHAP. X. sist in valuable rights rather than in valuable physical objects. Sometimes, however, the word is used to designate only those pieces of property which are literally spoken of as goods, and can be handled, possessed, and stored. And this leads to another different and, for present purposes, more important division of personal property, *i.e.*, the division of all personal property into—(a) choses in possession, (b) choses in action.

This subdivision is exhaustive—that is, anything which is not a chose in possession must be a chose in action, or it is not personal property. The word “chose” simply means “thing,” and *things in possession* comprise all tangible forms of personal property which are actually possessed by some owner or someone on his behalf.

It is not necessary that a man should carry personal property about with him to possess it, but he must have it under his physical control in some way. It may be within a room, a house, or warehouse of which he is master; or in a garden, or paddock; or it may be possessed for him by a servant or agent.

Negotiable
instruments
are things in
action.

To explain and to understand the other category, *things in action*, is a little more difficult; but it is in this class that documents of credit, or most of them, come. The term is applied to those items of personal property which cannot be actually handled and touched—forms of property that consist in valuable rights rather than in valuable things. For instance, if I am a shareholder in a company, my rights are valuable, though they cannot be seen or handled. No part of the property in possession of the company can be called my share, but I have a right to participate in the profits of the company and take part according to my share in its management. If the directors should attempt to exclude me from my rights, I could enforce them by an action, and that is why a right of this class is called a chose in action, namely, that, in order to enjoy the fruit of one's rights, or to

reduce the *right to have* to actual *possession*, an action at law is ultimately necessary. A debt is a species of property of this kind; indeed, debts are the principal and primary choses in action. It is to rights of this kind that the name chose in action was given, and the term has been subsequently extended as a useful way to classify numberless modern forms of property which are analogous to debts in that they have no corporeal existence, and must, if necessary, be enforced by action. In its most limited sense, chose in action is sometimes used as synonymous with a debt.

It is quite clear that when a debt is created by a loan of cash the lender hands over personal property, of which the borrower takes possession, but the possession of the borrower is on his own behalf, and not for the lender, who has no longer the property or possession which he had formerly; that is gone, and its place is taken by an obligation on the part of the debtor to repay. This obligation on the part of the debtor is purely an abstract thing, which you can nowhere touch or see; it exists in idea only (though in a true sense it is very real), and this it is that constitutes the chose in action. It is true that an acknowledgment in writing of the debt may be given, but that is not necessary, though usual; the effect of the writing is not to make the debt, but to assist in proving its existence; the writing itself is necessarily on paper, and the written document is a physical thing, a chattel. It is not the debt, but is useful evidence of it. In the same way, the existence of shares in a company is sometimes evidenced by a share certificate or by scrip, and these are chattels, and capable of actual possession.

It will be seen, then, that choses in action are frequently connected with or identified by some chose in possession, which is evidence of them. It may thus be said that a chose in action often has a chattel or physical part, but that does not make one into the other. In the

Chattel part
of a bill and
chose in
action
distinguished

CHAP. X. illustration I have given you the debt exists whether the documentary evidence of it be created or destroyed or not; and I want to enforce this distinction, so that in reading law relating to bankers' documents you can perceive for yourselves where the chattel part, and where the chose in action represented by a banker's document, is being dealt with. With regard to many instruments, it is the case that the chattel part and the rights it represents are transferred together by manual delivery of the instrument, accompanied in certain cases by indorsement. This is the case in respect of all negotiable instruments.

Chattel part
of a note the
most
important.

Now all documents of credit issued by a banker have necessarily a physical existence—that is, they all have a chattel part, but the degree of importance of this chattel part varies considerably. In the case of bank notes, for instance, the physical part is the chief thing; they are passed from hand to hand as actual money, and one rarely, if ever, has to resort to the legal rights which travel with them. This is particularly so in Australia, where notes are always paid. Even when some banks were forced into temporary suspension and reconstruction in 1893, all the notes were paid—since then there has not been any failure or any hesitation to pay its notes on the part of any bank issuing notes in Australia.

In the history of banking it has not always been so, and formerly, in England, when the business of banking was in private hands, it happened that, among the great number of private banks, there were some that were mismanaged, and failed. In such cases it was necessary to ascertain the rights of the parties who, at the moment of failure, held unrepresented notes of the broken bank, and if their sole claims lay against the bank, or whether they could recover from the persons who had changed the notes with them.

Rights of
transferror
and trans-
ferree.

Generally speaking, if a note had passed as cash in payment for a sale made at the time of passing, there could be no claim by the holder upon the previous trans-

error; but it was otherwise if the note had been remitted in reduction of an account, or exchanged for convenience and not retained as cash by the receiver, but sent on for collection in due course, or promptly put into fresh circulation. CHAP. X.

In the days of big companies, and when complete smashes do not occur, it is hardly necessary to bear even this in mind. And if you have recourse to English text-books, many pages, and even whole chapters, on this and kindred matters—in such a book as “Grant on Banking,” for instance—can be left out of consideration as not having any practical use or application.

If the chattel part of a bank note is its principal feature, it is otherwise in the case of a fixed deposit receipt; that is at the other end of the scale; it is not even negotiable; transferring the document will not usually transfer the rights of the depositor, and the contract which exists between the bank and the depositor is the main thing to consider. The saying that possession is nine-tenths of the law would have far more application in the case of a bank note than in the case of a deposit receipt.

Bank Notes.—A bank note once issued may be defined as a promissory note payable to bearer on demand, and intended to circulate as money. As such it comes within the provisions of the Bills of Exchange Act, but, as has been pointed out, seeing that it circulates as money, and is practically invariably paid in full on demand, the rights which attach to it as a bill only come into view in exceptional cases, such as the failure of a bank, or in cases like *Miller v. Race* or the *Hay case*.

Ante, pp. 115,
118.

There are, however, a few other and more common instances where it is important to bear in mind the rights connected with notes; I mean the cases of halved, lost, or mutilated notes.

CHAP. X.

Halved notes

In the cases of notes which are transmitted by post in halves, the law is that delivery of the money is not made until the second halves are posted; this is for the reason that the transferror thus retains in his own hands the power to perfect delivery. It is possible, therefore, if desirable, to avoid or withhold completion of a contract involving payment in this way, by holding back the second halves.

Lost or mutilated notes.

In the case of a lost note, the loser (being the owner) has the right to have the note paid by the bank if he give a proper indemnity. The bank has a right to such an indemnity as the Court would consider sufficient. The same would be the case in respect of a mutilated or halved note if the claim were made by the person entitled to the note. But, in the case of a halved note, it must be remembered that anyone taking such a thing does so with notice of a defect, and that the half-note does not give a claim to half-payment, though banks do sometimes compromise claims in this way. It has been judicially stated by very high authority that a banker would be bound to pay, on production of the half of a note, without an indemnity, upon the ground that anyone taking the other half would have notice. At any rate, the banker would be bound to pay the person presenting such a note in full if he were the owner of the whole note. I see no reason, however, why the bank should not, in ordinary cases, disbelieve in his ownership until he proved his right beyond a doubt. The same applies to mutilated notes; of course, if the mutilation is slight, and substantially the whole note is presented, the bank pays in full without question. This is always done if, when the note is presented, the numbers of both right and left hand half are intact. With regard to the rights of a finder of lost bank notes, see *ante*, p. 11.

Whether number of note material.

In the case of Bank of England notes, the number has been held to be a material part of the note.

Bank Post Bills are a class of document akin to bank notes. You will find them referred to in text-books. They are not in use in Australia, and in England at the present time they are, in fact, issued by the Bank of England only. They are bills payable to order (at seven or sixty days, according to the present practice); they are issued accepted, and, accordingly, are practically equivalent to promissory notes. They are used to fulfil the same duties as bank drafts, money orders, and postal notes. Such documents have come under review in at least two English cases worth mentioning; in one, the following remarks upon the character of the document were made:—

“These instruments are either bills of exchange or promissory notes. I am inclined to regard them as bills of exchange. Indeed, the operation of a bank post bill is similar to that of a bill of exchange.”—Pollock, C.B.

Forbes v. Marshall,
1855, 24 L.J. Ex. 305.

And also—

“It is an approved mode of doing business, and has been in use by the Bank of England for a century at the least, and is a most beneficial practice. The document is payable to order; it enables a debt due at a distance to be paid by means of it, and is, in fact, as good as money.”—Martin, B.

In the other case the document, a post bill for £100, had been lost by the plaintiff, and the defendant was a banker, with whom it had been exchanged for value by a stranger eight days after the loss; the stranger said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand; the banker made very little inquiry. The plaintiff had diligently advertised her loss, but the defendant was quite unaware that any such document had been lost. At the trial it was left to the jury to consider whether there had been originally a want of ordinary care on the part of the plaintiff or a want of diligence in publishing her loss, or negligence in the de-

Strange v. Wigney,
1830, 6 Bing. 677.

CHAP. X. defendant upon the occasion of cashing the bill—the alternatives do not seem complete; however, the jury found for the plaintiff, and, on appeal, it was held that the case had been left to the jury in the right way, and the defendant should lose. Had the document been a bank note for £100, the decision must have been the other way, for as a purchaser for value, the defendant's claim could not be defeated by merely finding negligence against him, and unless his good faith were impeached, his title would be perfect. The tendency of this case is to point a distinction between documents transferable on delivery and those requiring endorsement,* the need for which leaves a greater scope for the exercise of caution. And, although other English cases are reported in which bank post bills appear to have been regarded as money, the effect of the case I have just related to you seems to be to cut down the full force of the expression, "they are, in fact, as good as money."

Bank Drafts are divisible into two classes—

- (a) Drafts by one bank upon another;
- (b) Drafts by one branch of a bank upon another branch of the same bank.

Class (a) are simply ordinary bills of exchange; when once issued they are not governed by any doctrine peculiar to banker and customer. The Act applies to them in exactly the same way as to drafts between other parties.

Supra.

Class (b) are very similar to the bank post bills just discussed; the holder of such a document is in a very good position, for he can treat it either as a bill of exchange or a promissory note; that is provided by the Bills of Exchange Act. But the bank is not in so good a position, for the document is not one drawn by one person upon another, but by one person (the bank) upon itself; it does not, therefore, comply with an essential part of the defi-

* Yet this document before loss had been indorsed in blank; one would expect the Court to treat it as freely negotiable. The decision, if not wrong, is difficult to understand.

nition of a bill of exchange, and there is no special pro- CHAP. X.
 vision in the Act to enable the bank to treat it as a bill;
 consequently the bank is not protected by section 60 of 1902, 1 K.B.
 the Bills of Exchange Act in case of payment upon a 242.
 forged indorsement, and would have to make good the 1903, App.
 amount to a rightful claimant; and it has been recently Cas. 240.
 so decided in England, in the case of *Gordon v. Capital*
and Counties Bank.

In Queensland, however, the law has been altered by
 the recent Bills of Exchange Act Amendment Act, 1905, Section 2.
 which expressly provides that such documents shall be
 deemed to be bills payable to order on demand, signed
 by one person and addressed to another, for the pur-
 pose of bringing them within the clause protecting
 the banker who bona fide pays upon an indorsement which
 is forged or unauthorised (section 61 of the Queensland
 Act; 60 of English and New South Wales Acts). In
 Victoria a similar amendment has been obtained by the Instruments
Act, 1904.
 banks, and it seems likely that New South Wales will
 follow suit.

It is worth while pointing out that, when once a bank Mode of
redeeming.
 draft, payable to order, has been purchased by any person
 for another, it would be unsafe for the bank to cancel the
 document and refund the price to the purchaser at his re-
 quest, even supposing the request were made within a few
 moments and accompanied by a statement that the pur-
 chaser had changed his mind, or some similar explanation.
 This is pointed out in Mr. Stewart's Handbook for Bank 3rd ed.,
Sydney—
Wm. Brooks
and Co.
 Clerks, par 2. The reason is this—that you do not know
 what rights may have arisen, or what contract has been
 fulfilled by the purchase of that document. The obliga-
 tions of the bank upon it should, in strict law, be allowed
 to be solved in the regular mode; though in many cases
 it would be unwise and even unnecessary for the banker
 to insist upon this, provided he has inquired into and
 really knows the circumstances.

If a bank receives from another bank a draft in

CHAP. X. favour of a particular individual, it is not responsible to him for the amount of the draft unless it agrees or consents to hold the money for his use. Until it does so, it holds the draft as agent for the bank that remitted it.

Lost draft. If a bank draft were lost, the rightful owner could recover the amount from the bank issuing it on giving a sufficient indemnity.

Letters of Credit.—In “Hamilton on Banking” it is pointed out that a letter of credit, purchased from a banker by a party desiring to make a payment to another, might provide a safer means of payment at a distance than payment by bank draft. The writer appears to have been under the impression that a distinction could not be drawn between drafts upon other banks and drafts upon branches, and that the bank which should happen to pay upon a forged indorsement would nevertheless be protected by the Bills of Exchange Act. It is the law that the bank in such case is protected if the drafts are not drawn by one of its own offices, and in places where the Amendment Acts already referred to have become law the bank will be protected in any case. But if the same operation were carried out by letter of credit, the loss would fall upon the bank, as the following case will show. It may be, therefore, as Hamilton suggests, that if the banks get too much protection in respect of their drafts, the public will utilise other methods.

(1854)
1 Macq. H.L.
513.

The case of *Orr and Barber v. Union Bank* is, perhaps, the most important that has been decided upon letters of credit. It is a decision of the House of Lords. The facts were that one Campbell desired to pay a sum of £460 9s. to Orr and Barber, in Liverpool, and to that end purchased from the Union Bank, in Glasgow, a letter of credit requesting the Liverpool Bank to honour the cheque of Orr and Barber for the requisite amount. The letter was handed to Campbell, who posted it to Orr and Barber, but a dishonest clerk employed by that firm intercepted it, so that it never reached his masters' hands, both

members of the firm being temporarily absent. He forged their signature to a cheque on the Liverpool bank for the amount, and succeeded in cashing this forgery at the bank where he delivered up the letter of credit. As soon as the fraud was found out, the firm of Orr and Barber demanded payment of the Liverpool bank of their true cheque for the amount. This was refused. They then demanded payment of Campbell, who resorted to the Union Bank, who refused. This action was then brought.

The following passages from the judgments show exactly the rights of the parties and legal nature of such an instrument:—

(a) "The Union Bank must show either that the Liverpool bank actually paid the draft of Orr and Barber when called on to do so, pursuant to the letter of credit, or else that they did something which, as between them and Orr and Barber, they are entitled to treat as equivalent to payment. It is certain that they did not pay the draft of Orr and Barber, and the only question, therefore, is on the other alternative, whether the payment which they made on the forged cheque is a payment which they are entitled to consider as valid between themselves and Orr and Barber. If it is, then Campbell would be entitled to treat Orr and Barber as having received the £460 9s., and so would be entitled in account with them to have credit for that amount. The Liverpool bank would rightfully debit the Union Bank for that sum as paid on their account, and neither Campbell nor Orr and Barber could have any claim on the Union Bank. But, if the payment on the forged cheque was not a valid payment, as between the Liverpool bank and Orr and Barber, then Orr and Barber have not received anything from Campbell. He is still liable to them."

(b) "A letter of credit is not a negotiable instrument. The letter of credit merely gave authority to the

CHAP. X. bank to honour the cheque of Orr and Barber. The circumstance that the letter of credit was in the hands of the clerk did not necessarily or naturally import that he was the person entitled to draw for the amount mentioned in it. The bank ought to have made inquiry as to who were the drawers of the cheque, and they ought to have satisfied themselves as to the genuineness of the signature. The fact that it was presented by a person who held and gave up the letter of credit raised a presumption that it had been drawn by the proper party. But it was only a presumption, and if the bank chose to act on such a presumption without further inquiry, they must abide the consequence. If, then, the Liverpool bank cannot set up the payment which they made on the forged cheque, it follows of necessity that the present claim of the appellants (Orr and Barber, and Campbell) is well founded; for they can have no possible remedy against the Liverpool bank, between whom and them there is no privity whatever. The Union Bank have given to Orr and Barber a credit on the Liverpool bank; but that bank will not honour their draft, so that the parties are necessarily thrown back on those with whom the money was originally lodged, and whose contract has not been performed. The Union Bank will have their remedy against the Liverpool bank by disallowing in account any sum alleged to have been paid on the letter of credit; but with that the appellants have no concern."

It should be mentioned that according to English practice, Campbell being the one whose contract with the Union Bank was sued upon, would have been the plaintiff, but by Scotch practice Orr and Barber, who had an interest in the letter of credit, were joined with Campbell as co-plaintiffs, or, more correctly, as co-pursuers, for that is the technical expression in Scotch law.

Circular Notes.—A circular note is a request by a bank to its correspondents abroad to pay a specified sum

to a named person. The latter is usually furnished with a *letter of indication*, signed by an officer of the bank and by himself, which is referred to in the circular note, and is intended to be produced on presentation of the note.

Questions in connection with these instruments have usually arisen out of their loss by customers.

The nature of these notes, the contract in respect of them, and the rights arising upon them, is well illustrated by the case of *Conflans Quarry Co. v. Parker*.

In that case the circular notes were procured from 1867, 3 C.P. 1 the bank (Parker) by an agent of the plaintiffs for the plaintiffs' use, with whose money the notes were purchased. The name of Rembeaux, an agent of the plaintiffs, was filled in the circular notes as that of the person who was to get them cashed. A letter of indication was issued with them; Rembeaux's name was filled into the body of the letter, but it was not signed by him. Letter and notes were addressed to Rembeaux, in Paris; the letter arrived, the notes did not, and they were not presented.

The plaintiff company offered to return the letter of indication, and demanded a return of the amount: which the bank was willing to agree to, but wanted a very complete indemnity. The company and the bank then disagreed as to the indemnity, and the company sued the bank. It was held that there was an ascertained practice for the bank issuing such notes to refund the amount of those which were not used. The payee of the notes was not obliged to fully use them, and as holder had an option to reclaim the money from the bank; but there was not any written part of the contract dealing with repayment, the right to which, being merely implied, was entirely subject to the written conditions of the instrument. The nature of this right, it was said, was plainly to be read in the nature of the transaction. In ordinary cases these notes themselves would be returned, and the banker could

CHAP. X. not be called upon to return the amount while there remained any outstanding possibility that the holder might procure cash from the banker's correspondents. In this case such an occurrence was thought to be possible, as merely giving up the letter of indication would not preclude the possibility. Thus it was held the duty to refund was not absolute, and the legal holder and purchaser of the unrepresented, and probably lost, notes could not recover by suing as for a debt.

Hart,
Banking,
p. 561.

In another case, the letter of indication issued by the London and County Bank had printed upon it, in prominent red type, the following words:—"Particular attention is directed to the following note: For the security of the holder, it is indispensably necessary that this letter should be kept apart from the circular notes, which should on no account be signed, except in the presence of the banker from whom payment is required, to whom this letter should also be produced." A Mr. Rhodes, to whom the notes had been issued, lost them (six in number) and the letter of indication, which were together in his pocket. He notified his loss, but in spite of that the notes were cashed upon forged signatures by correspondents of the bank. Rhodes sued the London and County Bank to recover the amount, but judgment was given for the bank.

These cases should bring out clearly for you the difference between these non-negotiable instruments and the earliest-mentioned classes, viz., bank notes and drafts. In respect of the latter you will notice the questions relate to ascertainment of the holder for value and his rights with respect to those whose duty it is to honour the document on presentation, or from whom he has received it. But, in the case of non-negotiable paper, such as circular notes and letters of credit, if difficulties arise, the question is to ascertain the original contract and what are the outstanding rights remaining upon it.

Fixed Deposit Receipts are not strictly documents of credit at all. They are vouchers or documents issued by the bank to depositors, by way of acknowledging receipt and setting out the express terms of the contract, in respect of which a certain sum of money has been specially deposited. Such deposits are lodged for terms of three, six, twelve months, or two years, or perhaps longer, as may be agreed, and bear interest, the interest usually depending, to some extent, on the period. They are **not** liable to be honoured at a distance, nor are they used to assist in the transfer of money, unless accidentally, as it were. With respect to them, it is more necessary, even than in the case of letters of credit, to point out that the essential thing to look at is the contract between the bank and the depositor, contained, of course, in the requisition by the customer and the written receipt issued by the bank. Or, it might be more correctly put—contained in the written contract of fixed deposit, which may be explained, if it be not self-complete, by the written requisition which procured it.

When the deposit has matured, the bank owes the customer the amount as a simple debt, payable at call, exactly in the same way as it does a credit balance upon current account, except that the depositor may not have been given, and, therefore, has not got, the right to call for the amount by cheque; but it may, of course, be a term of the contract that the amount shall be drawn by cheque, and the deposit delivered up. Although the banks usually try to get in the old deposit, it is not essential for the customer to produce this, unless expressly made so by the terms of the contract.

Cf. Dixon v. Bank N.S.W.
17 N.S.W. L.R., Eq.
355.

I have dealt with fixed deposits among the class—documents of credit—because they are formal documents, which are usually very carefully kept, and the delivery up of them is expected by the bank. Thus the transfer of possession of them may be used in equity as evidence

CHAP. X. of the assignment of the debt which they represent, or, in case of the estate of a deceased person, as evidence of a *donatio mortis causa*, that is, a gift made in expectancy of death, which will be recognised by the Court and ordered to be carried out, though the regular legal method of transferring the property has not been followed.

*Donatio
mortis causa.*

Fixed deposits, indeed, are recognised as fit subjects for such gifts; so are savings bank books, and for the same reason. It does not follow from this that the bank's legal position is altered in the least bit. The bank need only pay according to its contract, and, if the depositor dies, the bank will follow its contract by paying to the administrator or executor of the dead man. Equity itself will do the rest by making the person paid trustee for the other.

Incidental
transfer.

If two persons deposit money in their joint names, and one dies, the bank, in the absence of instructions at the time, should pay the survivor; this will be the same if the two are husband and wife.

In these ways, fixed deposits may indirectly assist in the transfer of money or credit; but, even in such a case it is not the written document that effects the transfer, but operation of changing circumstances upon the contract, which, as circumstances alter, is fulfilled with suitable alteration under the law.

CHAPTER XI.

CHEQUES GENERALLY.

In the first place, a cheque is not an assignment of the balance or portion of the balance of the drawer's funds at his bankers; it is quite clear that this is so; cheques have no priority according to date, and the banker on whom they are drawn pays them in the order of presentation. CHAP. XI.
No priority.

A cheque is itself a separate chose in action, and would be unassignable at common law were it not for the peculiar feature of negotiability, which, as previously explained, has been engrafted upon the common law from the law merchant. This feature of negotiability a cheque possesses in common with all other bills of exchange. By reason of its negotiability a cheque (subject to what is hereafter stated with regard to cheques crossed *not negotiable*) can be freely transferred from holder to holder, by mere delivery if payable to bearer, or by indorsement and delivery if payable to order; and such a transfer gives a *bona fide* transferee for value, a better title, if necessary, than the holder himself had, so that the transferee may enforce payment of the cheque which he has thus honestly come by, even though he got it from a thief who had stolen it. The doctrine of negotiability has been instrumental in shaping the present form of paper currency and methods of banking business. Chose in
action.

Negotiable.

Since the Bills of Exchange Act of 1887, we have a clear statutory definition of a cheque. A cheque is a bill of exchange drawn on a banker payable on demand Definition
of cheque.

| | |
|---|---|
| CHAP. XI | to or to the order of a specified person or to bearer. And |
| Definition of bill | a bill is defined as follows:—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer. |
| Payee | You will notice the payee has to be a specified person or bearer; but the specified person may happen to be fictitious or non-existing— <i>e.g.</i> , the name of a dead person, or a name which is of no one, though pretended for a person, or the name of a real person, used fictitiously (as one who could have no connection with the document)—and this is provided for by the Bills of Exchange Act, which enacts that in such a case the document may be treated as payable to bearer. |
| Not cheques | If the document is not payable to bearer nor to the order of a specified person, but is drawn in favour of <i>something or order</i> , such as a cheque form filled in in favour of “insurance premium” or order, it would appear to be not a cheque at all within the meaning of the Act. |
| Date. | It does not matter if a cheque is undated, for any holder may insert at any time the true date of its issue, and if a wrong date is inserted the cheque is not invalidated, nor is a cheque invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday. |
| Post dated cheques. | As to the effect and nature of a post-dated cheque, there are probably a good many questions still to be answered, but it has been decided in England that a cheque which was in court and which was proved to have been post-dated, and which bore a penny stamp, was sufficiently stamped; had the cheque not been sufficiently stamped at the time it was tendered in evidence, it could not have been received. |
| Royal Bank of Scotland v. Tottenham, 1894, 2 Q.B. 715. But in Vic Act, 1274, s 7 | |

In the English cases on the subject a post-dated cheque is for some purposes looked upon as a bill of exchange; on the other hand, it has never been decided that such a cheque requires at any time in its history ad valorem stamp duty. In London it is the custom of bankers to refuse payment of post-dated cheques if presented before their date; and, being the custom, it becomes in that place a term of the contract between the banker and his customer, that the banker will return any of his cheques that may be presented post-dated. It is believed this custom prevails in Sydney and Melbourne, and would have legal recognition. If presented after date, the bank may safely pay.

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Forster v. Mackreth (1867) L. R. 2 Ex. 163.

Emanuel v. Roberts, 1868 9 B. & S., 121, and Hart Banking, p. 268, note u.

In Queensland, however, it has been decided by the Full Court in Brisbane, after a very long and exhaustive argument, that a bank which paid and charged its customer with a post-dated cheque at a time when the cheque was still post-dated, was within its rights, and not liable to its customer, the drawer, for the subsequent dishonour of another cheque caused by the previous payment.

Queensland.

In the case referred to, the judgment of Sir Samuel Griffith, then the Chief Justice of Queensland, was based upon the twelfth section, which enacts that in cases where the wrong date has been inserted in a bill, it "shall operate and be payable as if the *date so inserted* had been the *true date*." Now, if you look closely at this quotation and at the words in italics, you will find it somewhat difficult to tell which is intended to be subject and which predicate. At any rate, the Chief Justice took the view that a cheque must have a true date; that its true date is its date of issue; that since by the Act it is not invalid by reason of post-dating, the post-date must be a wrong date, and the cheque payable as though the true date (*i.e.*, of issue) had been filled in. The other two Judges agreed that the bank's conduct in paying was justifiable; but Mr. Justice Harding took different grounds for his judgment; he thought it quite unneces-

Magill v. Bank N. Q. 8 Q. L. J., 262.

CHAP. XI. sary to decide so much with regard to post-dated cheques, for, even if they should truly be bills payable at a future date, as assumed in some English cases, it would still be quite within the rights of holders to present them for acceptance to the drawee, the bank (though not necessary), and in such cases the bank could accept and set off against the drawer's credit so much in account as would be necessary to recoup itself for liability in respect of acceptances on his behalf. And this view of a post-dated cheque is worth some consideration. You will see that the case I have described does not go so far as to say that the bank could not have refused the cheque.

In spite of the decision above, which is certainly the most important delivered in Australia bearing directly upon the subject, I believe many banks at that time instructed their branches, in New South Wales at any rate, to adhere to the custom of returning any post-dated cheques that might be presented for payment.

New Zealand,
1901, 20 N.Z.
L.R., 174,
Pollock v.
Bank N.Z.

In New Zealand, on the other hand, upon the point arising in precisely the same way—viz., in an action by a customer for damages for wrongful dishonour—it was held that a bank is not entitled to pay a post-dated cheque before its date and charge the amount to its customer's account, or to treat the cheque as a bill presented for acceptance and hold the customer's funds to meet it. Therefore, where a bank paid a post-dated cheque before its date and then dishonoured another cheque of its customer (presented before the date of the post-dated one) on the ground that after payment of the post-dated cheque there were not sufficient funds to meet the other: it was decided that the customer was entitled to recover damages for the dishonour. This judgment was given by a Full Court of six Judges, who were in agreement. The Queensland case was reviewed; and the New Zealand Court did not think that, in the case of intentional post-

dating, the post-date could be called a wrong date, and CHAP. XI.
the date of drawing or of issue the true date.

In Victoria, a decision similar to that of the New Victoria, 1
Zealand Court had been given in 1870; *i.e.*, before the V.R. (L.) 229.
passing of the Bills of Exchange Act.

A cheque should be presented by the holder within a reasonable time, but non-presentment would not, as a rule, cause him to lose his rights against the drawer, who Presentment.
could be sued at any time within six years; but the recourse on the drawer might be impaired or made valueless if the drawer had the right to have the cheque paid by his banker upon presentment within reasonable time, and has suffered actual damage by the delay (*e.g.*, by failure of the bank).

And if the holder has recourse upon an indorser, this will be entirely lost if the cheque be not presented within a reasonable time. In determining what is reasonable time, regard would be had to the usage of trade and the facts of each case.

A most important subject in connection with cheques Crossings.
is that of crossings. The negotiable character of cheques had been well established in law before crossings came into use at all. The development of the practice and law as to crossings is traced in the next chapter. The courts were at first unable to see how the doctrine of negotiability could be preserved intact if a significance so strict as the mercantile world desired were attached to the crossing of negotiable paper. The Judges in London, therefore, at first allowed to the crossing of a cheque no greater legal effect than an instruction to the paying banker, that the cheque should be expected to be presented through some bank, and to be on guard should it be presented in any other way. The Legislature had then to step in, but it was not at first completely successful. The first Crossed Cheques Act required and re-

CHAP. XI. received various amendments. The statute law on the subject is now found in the crossed cheques sections of the Bills of Exchange Act.

By section 76 of this Act—

(1) Where a cheque bears across its face an addition of

(a) The words “and company,” or the word “bank,” or any abbreviation thereof respectively, between two parallel transverse lines, either with or without the words “not negotiable,” or

(b) Two parallel transverse lines simply, either with or without the words “not negotiable,”

that addition constitutes a crossing, and the cheque is crossed generally;

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,”

that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

Four crossings.

There are, therefore, four recognised crossings under this section, viz. :—

A crossing—

- (a) Generally with negotiability unrestricted,
- (b) Generally not negotiable,
- (c) Specially with negotiability unrestricted,
- (d) Specially not negotiable.

Cf. *post*, p. 158, *et seq.*

Not negotiable. See *infra*.

The effect of a not-negotiable crossing is to destroy negotiability in the instrument; so that, if a person takes a crossed cheque bearing on its face the words “not negotiable,” he shall not have, nor be capable of giving, a better title to the cheque than that of the person from whom he took it. But the mere transfer of such a cheque is in no way prevented.

With regard to the special rights and duties of the banker in connection with crossed cheques, the subject is dealt with in the next two chapters. CHAP. XI.

No crossings other than those mentioned above have any recognition in the Bills of Exchange Act. It is well, therefore, to observe and bear in mind that other crossings, being outside the Act, can have no validity or protection derived from the statute. Unauthorised crossings.

But in Queensland a crossing for the credit of a specified payee is specially recognised. a Q. Act, s. 77 (2). See post, p. 159.

With regard to instruments which are not cheques (or bills, or promissory notes,) as defined in the Act and to crossings which are not recognised crossings, bankers should notice that they have neither authority nor protection in respect of them from the statute, and conduct must be regulated in each case by a reference to the contract between bank and customer, and the express instructions, if any, which the document upon the face of it bears. In the case referred to a few pages previously, for instance—that of a cheque in favour of “insurance premium” or order, but otherwise regular—there is no one who can give a valid discharge for it by indorsement, yet it appears to require a discharge. It may be that, when presented, the banker knows the drawer’s insurance company, and the cheque bears a certificate or marks showing that it is being collected for that company. Here, perhaps, the banker would do well, in his customer’s interest, to pay the cheque; whereas, if it were presented across the counter, by an unknown, for cash, it would be wise to refuse, as payment, if made, would certainly involve the banker in risk of a claim by the drawer. Documents outside Bills of Ex. Act.

It was recently held in England, in the case of *Pay—order, Chamberlain v. Young*, that a bill in favour of ———— 1893, 2 Q.B., 206. order was equivalent to a bill by the drawer in his own favour, and negotiable upon his indorsement—it being

CHAP. XI. said the instruction "Pay to ——— order" was equal to the expression "Pay to my order." The Judges were careful to avoid deciding the effect should the form have been "Pay to ——— or order."

Not Negotiable Cheques.—The increasing tendency among business men to cross cheques "not negotiable" is now very marked. The safeguard obtained is so very great that it is remarkable to see how long it took the business community to realise its value, and how slowly the use of this form of crossing has spread. The following remarks on the position of the parties handling not-negotiable cheques may be of use.

1. *The Drawer.*—By the use of the not-negotiable crossing, the drawer gains a great advantage, especially in the case of cheques sent by post or by messenger. For instance, a cheque goes astray in the post. Finding it has not been presented, the drawer stops it, and, at the request of the payee, issues a duplicate, which is duly paid. Presently, the original, which has been stolen, is presented to the banker on whom it is drawn, and returned unpaid. Whether the person who has taken it *bona fide* and for value from the thief can recover the amount from the drawer depends on whether the latter has taken the precaution of crossing the cheque "not negotiable." If he has so crossed it, the transferee has no claim. He cannot show a better title than the person from whom he took it, and his only remedy is against the thief. If, on the other hand, the cheque was not so crossed, the holder can successfully sue the drawer. Or the stolen or intercepted cheque may have been properly paid by the bank before any stop order was lodged; meantime the creditor of the drawer has not received the cheque, and his claim is still outstanding, and awaits settlement; unless, of course, settlement by open cheque through that channel was at his request.

2. *The Drawee.*—The banker on whom a "not nego-

liable" cheque is drawn incurs no special liability in paying it, whether the person to whom he pays it be the payee or not. All he has to do is to satisfy himself that the document, as presented, is in order.

3. *The Collecting Banker.*—The collecting banker, *provided he be nothing more than a collecting banker*, incurs no liability in receiving, for the credit of a customer a cheque crossed "not negotiable." He is protected by section 82 of the Bills of Exchange Act. The qualification in italics is important, since the protection extended to the collecting banker *qua* collecting banker does not apply if he has done anything which constitutes him the *holder* of the cheque; if, for example, he has advanced against it. In that case, if the cheque has been stopped, he cannot recover against the drawer, as he undoubtedly could have done if the cheque had not been crossed "not negotiable." Having made himself a holder of a "not negotiable" cheque, he has no better title to it than the person from whom he took it. This, then, is the danger which the collecting banker has to avoid: becoming a holder. So long as he is a collecting banker and nothing more he is secure. (See chapter on collecting bank, *post*, p. 169.)

4. *The Innocent Holder, Subsequent to a Defect in Title.*—Although he has taken the cheque in absolute ignorance of the taint attaching to it, and may have given the thief full value for it, he can make no claim on the drawer of the cheque; thus, if payment of it has been stopped, he cannot, as he could if it had not been so crossed, sue the drawer. His remedy is against the thief. To innocent holders of "not negotiable" cheques, however, no sympathy need be shown. They take a document bearing this crossing at their own risk.

5. *The Payee.*—The position of the payee is comfortable enough. He can recover from the person who has received the money subsequently to defect in title,

CHAP. XI. notwithstanding that that person may have taken the cheque in good faith and for value.

Grounds for Refusal to Pay a Cheque.—Turning now to the duty and authority of a bank towards the customer who draws upon it. There is a duty arising out of the banking contract to pay all cheques of the customer upon it, to the extent of the customer's balance available for such purposes. By section 75 of the Bills of Exchange Act, this duty, and also the authority of the banker to pay, are determined by

Countermand (1) Countermand of payment.

Death (2) Notice of the customer's death.

Joint a/c) With reference to this latter means of determination of authority, it should be pointed out that, as one of the legal consequences of joint ownership of property is the right of survivorship, the debts due to trustees or to a partnership accrue, upon death of one trustee or partner, to the others; and the authority of a surviving partner to draw cheques against the firm's account is not, therefore, terminated by death. Similarly in the case of co-trustees.

Bankruptcy. Apart from the Bills of Exchange Act, the authority of a bank is likewise determined upon a sequestration order in bankruptcy being made against its customer, or upon notice of an act of bankruptcy committed by him

See *post*, Chap. XXIV.
Lunacy. In the case of a lunatic or a person incapable of managing his affairs, the care and management of his property will pass, upon the proper orders being made, to the master in lunacy or a committee of management, and thereafter the lunatic would not, of course, be allowed to operate upon the account. This is rather a matter of contractual incapacity, and you will find it referred to more fully, *ante*, p. 68.

Irregularity. Beyond the statutes referred to above, one must look at the general body of law on the subject. If, for in-

stance, a document which is not a cheque on the bankers (nor a regular bill or promissory note domiciled at the bank) is presented—such, for instance, as the cheque form already referred to—the bank would refer at once to the terms of the contract, express or implied from custom, or from an established course of dealing with that customer, and pay the document or not, according to whether it thereby fulfilled its side of the contract, together with the instructions, if any, on the face of the instrument. There must be regularity both on the face of the cheque and in the indorsements.

CHAP. XI.

A/c gar-
nished. pp. 140,
145.

Sometimes it may happen that a creditor of a customer is driven to enforce a judgment debt against him by attaching his banking account. In this case a garnishee order is served upon the bank; after receipt of such an order, it will be the safer course to refuse any cheques drawn on the account attached, even though the balance of account at the customers' credit is larger than the amount of the judgment debt mentioned in the order.

A/c gar-
nished.

A bank credit balance, being a chose in action, is unassignable at common law. Yet such an assignment, when made *bona fide* and for valuable consideration, would be protected by a Court of Equity and in Sydney, when an assignment was so made, and the bank notified, and it refused cheques drawn by the customer, on the ground that the balance had been assigned, it was held the bank was justified in so doing, as the Equity Court would have protected the assignment by an injunction if necessary.

A/c assigned.

Newman v.
Bank N.S.W.
12 S.C.R. 239

Two recent cases—*Healey v. Bank of New South Wales*, in Victoria, and of *Zeeb v. Bank of New South Wales*, in Sydney—seem to show the development of a further and new ground in our legal system. In these cases the bank was satisfied that its customer—the plaintiff in each case—was a convicted criminal, and that the balance at customer's credit was the fruit of the crime, or part of it, and had handed back or undertaken to hand

No funds of
drawer.

CHAP. XI. to the party defrauded (being the Government of the State of New South Wales) a sum equal to the credit balance; it was held the bank was entitled to show this to be the case, and thus justify the dishonour of cheques subsequently drawn, and the criminal was not allowed to recover either damages or the amount of his former credit balance. This may, however, be simply a matter of public policy, and is more fully discussed, *ante*, pp. 91-96.

No funds
available.

Sometimes a customer makes and a bank receives a deposit or collects moneys for a special purpose, and, when this is done, the bank, of course, has a duty to carry out the special contract thus made. This puts upon the bank the duty of protecting the special fund, and, if necessary of dishonouring an ordinary cheque rather than entrenching upon it. I need hardly say that it would often, in such a case, be wiser to communicate first, if possible, with the drawer.

No right to
draw cheque.

If a man's only right against a bank is to receive a remittance which the bank has undertaken to transmit, he is not, without prior arrangement, entitled to draw by cheque as against a current account in the ordinary way. And the same applies to one whose sole relationship is that of a fixed depositor.

Payment.

If a cheque is not to be refused on any of the foregoing grounds, and is drawn on the right branch, it will be paid as a matter of course, if the credit of the drawer is sufficient; and, in this sense, credit includes the right of the drawer to have his cheques paid and charged against an overdrawn account, if the bank has conceded such a right, and the cheque is within the limits of the agreement as to credit.

Answer on
dishonour.

Where a cheque has to be dishonoured, "Refer to Drawer" is a safer and more proper answer than "N.S.F." or "N.P.F." or any phrase indicating insufficient funds. Sometimes special circumstances enable

a bank to give a less ambiguous answer than "Refer to Drawer," and to some extent save the drawer's credit. CHAP. XI.

It is right for a banker to pay everything in the order in which it is presented. But bills lying in the same bank under discount to it would quite properly be paid first. Order of payment.

If a cheque and bill be presented together, and the customer's account be insufficient for both, the bank may give preference to either.

If the aggregate amount of bills and cheques presented in a batch exceed the amount available, the banker may pay as far as the customer's credit will extend; and must not dishonour the whole because the credit is not sufficient to meet the aggregate sum.

CHAPTER XII.

CROSSED CHEQUES—THE PAYING BANK.

CHAP. XII.

The fact has been pointed out that mercantile custom and the regular usages of business men are sources of the mercantile law—that when a custom has become general, and is reasonable and of utility, it becomes an understood thing that that custom shall govern the transactions within its scope. It is, as it were, an implied term in the dealings of business men, to which the custom relates, that such dealings shall be taken to be subject to conditions which the custom embodies. Until a custom has been decided to be good and of full legal effect, it is difficult to put one's finger on the precise point where, in the history of a particular class of business, a practice, or an implied condition operating between a few men, became so general that every contract within its scope must be understood and interpreted in the light of the custom. Generally the validity of the custom is brought to a test by a case at law. Some litigant claims the benefit of it, evidence is called, and the custom is either proved or disproved, being tested by its universality and reasonableness. It is, of course, very difficult to prove a custom—as it should be.

The law as to crossed cheques, however, is a good illustration of law derived from mercantile custom. Only in this case the law courts were somewhat slow to recognise the custom to its full extent, and their decisions had to be supplemented and varied by Acts of Parliament.

To understand the law with regard to crossed cheques, it is necessary to understand the general effect

of these decisions and of the Bills of Exchange Act so far as it relates to cheques, and particularly of seven sections of the Act which deal specially with crossed cheques. CHAP. XII.

Two of the early decisions with regard to this class of cheques are inextricably mixed up with the history of the subject, and the most natural way to explain the matter is by following the course of events. These decisions, too, though amendments of the law have since been made, are still useful as precedents and as examples of the application of legal principles to the ascertainment of rights in respect of cheques.

I will turn now to the case of *Bellamy v. Marjori-7 Exc., 389.* *banks*, date 1852. In this case the judgment of the Court of the Exchequer was delivered by Baron Parke, who in the course of his judgment said:—"Payment by cheques has now almost entirely superseded all other modes of payment in large, and is in very general use in smaller money transactions; and the practice of crossing them with the names of the bankers (the effect of which is the question in the present case) is also in very general use, and occurs in very many instances every day, not only in London, but in several other parts of the kingdom. It therefore seems to us to be of great importance that the effect of this crossing should be rightly understood.

"It was agreed on all hands that the practice of crossing cheques originated at the Clearing-house, the clerks of the different bankers who did business there having been accustomed to write across the cheques the names of their employers, so as to enable the Clearing-house clerks to make up their accounts. It is quite clear that this had nothing whatever to do with the restriction of negotiability; for, at the time when this was done, the cheques were in the course of payment or presentation for payment, and all their negotiability was at an end.

CHAP. XII. The establishment of the Clearing-house is comparatively modern, and was within the memory of several of the witnesses. It afterwards became a common practice to cross cheques which were not intended to go through the Clearing-house at all, with the name of a banker or with the words 'and Co.,' and a custom or usage has certainly sprung up in regard to this also. All the witnesses agreed as to the fact of the existence of such a custom, and we think that the great preponderance of the evidence on both sides tended to show the custom to be that which is reported to have been stated by some of the witnesses in the case of *Stewart v. Lee*, viz., 'that where a cheque is crossed, bankers generally refuse to pay it to anyone except a banker; and if they do pay it to a person not a banker, they consider that they do it at their peril in the event of the party to whom the payment is made not being entitled to receive it. That the object is to secure the payment, not to any particular banker, but to a banker, in order that it may be easily traced for whose use the money was received, and that it was not intended thereby to at all restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit.'

Origin of
crossing.

" We think . . . it is a matter of great public advantage and benefit that the custom or usage which we have already mentioned as being said to exist in point of fact, should be maintained; and we think it well may, without at all improperly trenching upon or restricting the negotiability of cheques. We think the crossing of a cheque is a protection and safeguard to the owner of the cheque, and that in the event of a banker paying a crossed cheque otherwise than through a banker, the circumstance of his so paying would be strong evidence of negligence in an action against him."

Cf. Bills of
Exchange
Act, s. 79,
and *post*, p.
163.

It will be seen that at this date the courts in England were prepared to recognise a general crossing, and to give effect in law to the custom that had grown up as to the purport of such a crossing. In the case from which I have been quoting, however, the plaintiffs, two joint drawers, had crossed the cheque specially to the Bank of England; it had not been paid to that bank, and the action was brought against the paying banker (really Coutts and Co.) to recover the amount, which had, of course, been debited to drawer's account. What had happened was, that the payee of the cheque, instead of putting it through the Bank of England and using the proceeds for a special purpose, had struck his pen through that special crossing and added another special crossing, to his own banker, through whom he collected, and then converted the proceeds to his own use. The court did not consider that any legally binding custom as to special crossings was established by the evidence, and held, therefore, that the bank could successfully plead payment of the cheque through a banker, and that payment through any banker satisfied the requirements of the crossing.

Effect of
general
crossing.

This would not be so held now. Very soon after this decision the first Crossed Cheques Act was passed. An amending Act followed soon afterwards in consequence of the decision of a court of law that a crossing was not an integral part of a cheque. The Act declared that a crossing should be held to be a material part of a cheque, and made it unlawful to obliterate or add to a crossing except in the authorised ways. This Act first gave validity to the special crossing.

These statutes were soon subjected to the critical examination of the Court of Appeal. This occurred in the case of *Smith v. Union Bank of London*. The facts were very simple. Mills and others owed Smith £21 9s., and gave him a cheque for that amount, payable to his order, upon the Union Bank of London. Smith indorsed

1875,
1 Q.B.D. 31.

CHAP. XII. his name on the cheque, and crossed it with the name of his bankers, *i.e.*, London and County Banking Co.; in this state the cheque was stolen, and eventually passed for full value to C. C paid it into his account with the London and Westminster Bank, who obtained payment of it from the Union Bank. The Union Bank thus paid in contravention of the crossing; but they paid it to C, who by negotiation of the cheque had become the true owner. The man from whom the cheque had been stolen—Smith—then brought an action against the paying bank. It was held that he could not recover, as, owing to the quality of negotiability and the fact that C had got the cheque honestly, title in the cheque had passed to C; and, having no title to the cheque, Smith had no title to its proceeds. The principle of the decision has never been questioned. It is an excellent illustration of the nature of negotiable instruments.

Negotiability
not destroyed
by special
crossing.

It is easy to see the difficulty that confronted the court when first asked to decide upon the legal effect of special crossings, for, if special crossings were to be strictly observed, the cheque should not be expected to be presentable through any banker, be he the banker of the payee or of any subsequent holder; and if a subsequent holder could not get payment through his bank, must it not have been intended to limit transfer. Yet the Act had not in express terms interfered with the doctrine of negotiability (an attribute stronger than mere transferability), and the decision shows how firmly established the doctrine is, seeing that the Courts continued to recognise it as a governing characteristic in a cheque, even after the special crossing had been authorised and made an integral part of the cheque by Act of Parliament.

In their judgments in this case, however, the judges made it clear that the bank had done wrong in paying in contravention of the special crossing. The decision

shows (and it is in harmony with other decisions) that a special crossing, whether it be placed there by the drawer of the cheque or afterwards by a holder (in an authorised manner) becomes a part of the customer's mandate to his banker, which the banker can only neglect at his own risk. Indeed, in this very case, the drawer of the cheque might have inquired into the manner of payment and repudiated payment of it against his account, by reason of his banker's negligence; really it was the case here that the bank could have been made liable at the suit of the drawer (if he could show damage), but he was bound to pay his own cheque to the *bona fide* holder for value, and the bank had done that for him. The bank had the luck to have paid to the agent for collection of a *bona fide* holder for value and to be sued by one who, having lost all his rights, was not damnified in any way by the action of the bank.

After this decision a further Crossed Cheques Act was passed, introducing the not negotiable crossing. Any cheque may now be crossed not negotiable in addition to either a general or a special crossing. The effect is to destroy negotiability, and if it is intended that the payee shall have the cheque collected at once, and that it shall not go into circulation, it is a wise precaution for any drawer to take, or any holder, for holders are entitled to add this crossing. It does not render the cheque not transferable; the cheque remains transferable, but only to the same extent as any other transferable chose in action, so that, a thief exchanging it for value to an honest man, can give him no title. Soon after the not-negotiable crossing was introduced, the law with regard to cheques was codified in the Bills of Exchange Act.

Not negotiable crossing introduced.

See ante, p. 146.

Before referring to the exact terms of the sections at present in force, however, I should point out that in New South Wales the history of crossed cheques was somewhat different. We had here, instead of a series of

CHAP. XII. Crossed Cheques Acts, only one Act. It was passed in 1857, and seems to have been equivalent only to the first Act passed in England; it did not recognise either the special or the not-negotiable crossing, and so the matter remained until the passing of the Bills of Exchange Act in 1887.

77-83 in Vic.
and Q.

I have mentioned the Crossed Cheques Acts were repealed and consolidated in the crossed cheques sections of the Bills of Exchange Act, where they form a group of seven sections. They are almost the same in Australia as in England, and are the sections Nos. 76 to 82, inclusive. The law is therefore now the same here as in England.

See *infra*

These sections are briefly as follows:—

Sec. 76 defines general and special crossing.

Sec. 77 says (1) a cheque may be crossed generally or specially by the drawer; and in succeeding subsections lays down the manner in which it may be crossed or further crossed after issue.

Sec. 78 enacts that the crossing is a material part of the cheque.

Sec. 79 sets out the duties of the paying banker.

Sec. 80 gives a measure of protection to the paying banker and to the drawer of crossed cheques duly paid.

Sec. 81 provides that a person taking a cheque with a not negotiable crossing shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he got it had.

Sec. 82 provides for the protection of the collecting banker in certain cases.

Next chapter deals with the position of the collecting banker, and we may leave him on one side for the present. Referring now more particularly to such of these sections as directly affect the paying banker, attention should first be directed to the definitions of crossings. The section is as follows:—

Section 76 (1) Where a cheque bears across its face an addition of: (a) the words "and company"* or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or (b) two parallel transverse lines simply either with or without the words "not negotiable"; that addition constitutes a crossing, and the cheque is crossed generally. (2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.†

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General and
special
crossings
defined.

* In New South Wales, Queensland, and New Zealand, the word "bank" *may* be used instead of "and company." In Tasmania the word "bank" *should* be used instead of "and company." But throughout Australia and New Zealand, the crossing may be by parallel transverse lines simply, without need for any words.

† In addition, in Queensland there is special provision for crossing by writing in the word "credit," or any abbreviation thereof, followed by the name of some individual or firm, either with or without the words "not negotiable"; and if this be done, the cheque is crossed specially to that individual or firm. But where such a crossing is made, and the cheque also bears across its face the name of a bank, the cheque is, as regards the duties of the bank on which it is drawn, a cheque crossed specially to the bank whose name it so bears across its face.

There are in Queensland necessary consequential alterations providing for this crossing in sections 78, 80, 81 [sections 77, 79, 80, N.S.W. and England], and further there is the proviso which gives this crossing its special value, viz.:

Where a bank receiving payment of a cheque crossed specially to an individual or firm pays the amount thereof otherwise than to the credit of such individual or firm, such bank is liable to such individual or firm for any loss he or they may sustain owing to the amount having been so paid. (Section 80 (3), Q.) See *post*, collecting bank, p. 175.

Otherwise the slight divergencies that exist between corresponding sections of the crossed cheques part of the Act in the various States are matters of language rather than substance.

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The principal matters to notice are:—That a crossing must be *across the cheque*; writing on lines horizontally along the cheque cannot make a crossing, and a cross drawn on the face of a cheque is not a crossing; and that there are really four authorised crossings, viz.: (1) General crossing simply; (2) general crossing not negotiable; (3) special crossing simply; (4) special crossing not negotiable.

Crossing by
the drawer or
after issue.

Section 77 shows in what ways crossings or additions thereto may be made under the authority of the Act. In the first place, the drawer may issue his cheque crossed generally or specially.

It may be noticed that the Act does not expressly empower the drawer to issue a cheque crossed “not negotiable,” though this is constantly done. If, however, the payee is content with such a cheque, it does not seem to be objectionable.

Sub-sec. (5)

If the cheque is issued uncrossed, the holder may cross it generally or specially; or if it is crossed generally when it reaches a holder, he may cross it specially, and in the case of any crossing, the holder may add “not negotiable.” Then in the fifth subsection it is provided that where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. And in the sixth, where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

Sub-sec. (6)

These last two subsections have an important bearing on everyday practice. The sixth subsection, you will notice, refers to cheques sent to a banker for collection, and authorises him to cross them specially to himself in certain cases, viz., where they are uncrossed cheques or cheques crossed generally (but not when they are already specially crossed). This power, therefore, is not one

which applies to the cheques which are brought in by other banks through the exchanges, and which you are perhaps asked to collect through your branches, for these cheques are always already specially crossed. Again, reverting to the fifth subsection, if you will follow the wording of it, you will see that, when a collecting bank sends on a cheque for collection to another collecting bank, the second special crossing is authorised to be added by the bank which sends the cheque on, and there is no authority for the agent bank to add a special crossing. These matters are of importance with regard to the 79th section. (*See below.*)

Section 78, as I pointed out shortly, enacts that an authorised crossing is a material part of the cheque, and makes it unlawful to obliterate or to add to or alter the crossing except in the authorised ways. This section was rendered necessary by a case which decided that the crossing was not part of the cheque itself, but only a memorandum. To fraudulently alter or obliterate a crossing would, therefore, amount to forgery; the paying banker, however, is protected if without negligence he pays in accordance with the ostensible crossing.

Section 79 is the section which expressly declares the duties of the paying banker. It is complicated and badly expressed. It provides, firstly, that if a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment.

From what has gone before, you of course recognise that the bank's own name stamped by rubber stamps upon the face of cheques going through its exchanges are special crossings. And this provision therefore means that if there are two different names of banks on any cheque when presented, the paying bank should refuse

CHAP. XII. payment unless the one bank is agent for collection for the other.*

The question is raised in the *Journal of the Institute of Bankers of N.S.W.* of March 31st, 1905, page 108. where a question is asked upon this section; and, as it appears to me, correctly answered, that the paying bank would be justified in requiring satisfactory assurance that the cheque (bearing two special crossings) was in the hands of the presenting bank for collection on account of the other.

p. 160.

If you refer back to the subsections 5 and 6 of section 77, you will see that if banks would keep exactly within the authority of the statute, that bank which sends cheques through another for collection from a third or paying bank should itself do the special crossing to the collecting bank.† If such a practice were adopted, it could easily be done so that agency for collection appeared plainly upon the cheque. The paying banker would then pay with perfect safety, whereas he now usually works upon an assumption. It is quite likely that in some case the assumption may be without justification, and the paying banker will then be hit. On the other hand, it may be that such a procedure would be more cumbrous than the present, and

*I remember pointing out this law in a lecture, and afterwards the chairman very wisely told those present that the safest course was to assume that the one bank always was agent for the other for collection, unless the stamps on the face of the cheque should show some unusual course or peculiarity. He was undoubtedly right, and did not want his clerks to return to their offices next morning and alter the practice by promptly returning a large number of cheques. And those readers who are junior clerks should know that any plain bald statement of law found in text books or elsewhere is not to be acted upon against some regular practice of your bank the next day. You learn law to appreciate the reasons which lead to the routine work in banking taking the form it does, and to make yourselves more competent in case of emergency.

†This, I think, is in Sydney done by the inward exchange clerk of the collecting bank.

not worth while. That is a matter of policy for each bank. From the text-books, I imagine that in England the practice as to crossing does conform more closely to the Act than here, and I find Mr. Allard, the secretary of the Institute of Bankers of N.S.W., takes the same view. CHAP. XII.

The second portion of this section, 79, provides that if a cheque which is so crossed be nevertheless paid, or a cheque crossed generally be paid otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom it is crossed or his agent for collection being a banker, then the paying banker shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. This section gives the true owner a remedy (which he probably would have had without it by mere operation of law). It therefore shows that the paying banker is liable, if he neglect the crossing, to be hit at from two quarters—viz., the true owner and the drawer. For it has already been shown that the authorised crossings on a cheque are incorporated with it, and become a part of the drawer's mandate or order to his banker, and such drawer could repudiate a debit to his account not warranted by his cheques.

The liability to the true owner may be illustrated in 1 Q.B.D., 31. this way. Take the case of *Smith v. the Union Bank of London*, already dealt with. Suppose exactly the same facts occurred to-day, with the addition that Smith, while he was lawful owner of the cheque, had added the words "not negotiable"; then, in spite of the theft and subsequent transfer of the cheque, Smith would have remained the true owner, and if he sustained loss by reason of its irregular payment, could successfully sue the bank under this section, 79. *Supra.*

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Cf. Chalmers
p. 258.

I have dealt with this point at some length. My excuse must be that some of the notes in Chalmers on those sections are misleading.*

*It is owed to the great authority of Mr. Chalmers to explain this.

In the note to section 76 Chalmers says of *Smith v. Union Bank*: "The Court held the true owner had no remedy against the paying bankers, because the negotiability of the cheque was not affected by the crossing." Now this is hardly so; the Court really held that the true owner was he to whom the stolen cheque had been duly negotiated (and that man had obtained payment). Where the note in Chalmers is misleading is in the loose use of the words "true owner"; if you substitute in their place the words *payee from whom the cheque had been stolen* in the sentence quoted, it would not be amiss.

Again, the last three lines of the note to section 79: "If the cheque had been payable to bearer or had been indorsed in blank by the payee before it was stolen, there would be no remedy apart from this section" is all doubtful law, and might as well be excised. The real remedy lies in the use of section 77, under which the holder may add to the crossing the words "not negotiable," thereby fixing himself as true owner, beyond the possibility of losing his title through dishonesty of others and the exigencies of negotiation, as happened in the case of the plaintiff in *Smith v. Union Bank*.

And section 79 does not give a remedy in the case of cheques payable to bearer, or which have been indorsed in blank, and have been subsequently stolen and dealt with, except to the "true owner," in a strict sense of that phrase. And although the section purports to give a remedy to the true owner, it is probable that he had such remedy by the ordinary operation of law, and the contrary was never decided. It is thus too much to say that "there would be no remedy apart from this section."

But in his footnote Chalmers goes further by adding "unless the cheque was crossed not negotiable," thus implying that in such cases the true owner would have a remedy apart from the section. That is not all, however, for that reading makes his view appear to be that the term "true owner" in the section, and to whom the supposed wider remedy of the statute is given, is used in the same wide sense in which he uses the phrase in the note to section 76 already referred to. The matter is more fully discussed in Paget's *Law of Banking*, pages 105, 106, and 107, in *Watson on Cheques*, introduction, pages xii. and xiii., whence these views have been mainly derived.

The banker's duty as laid down in the parts of the section I have dealt with is qualified by a proviso that if a cheque when presented does not appear to have had a crossing which has been obliterated or improperly altered or added to, and the banker pays without negligence and in good faith, the payment shall not be questioned by reason of the true crossing not having been complied with. CHAP. XII.

The 80th section is designed to give the banker who complies with the requirements of a crossing an adequate protection in return for his liabilities. It is really not much more than the converse of the proviso to section 79 just referred to. It also protects the drawer. The effect of the section is that, where a bank pays a crossed cheque in good faith and without negligence, and in accordance with the crossing, the bank shall be placed in the same position and have the same rights as if payment of the cheque had been made to the true owner: the drawer gets the same benefit. Protection to
banker and
drawer where
cheque is
crossed.

Really, the banker who takes care to pay his crossed cheques only in accordance with the crossings is pretty safe, and the protection of this section is seldom, if ever, required.

On the point where protection is most needed, the paying bank has a more useful protection in section 60, which allows a bank, provided it be in good faith and in the ordinary course of business, to pay order cheques, upon indorsements which purport to be correct, even though they have been made without authority or even forged. This, however, is a general section including both crossed and uncrossed order cheques, and in fact any bill of exchange drawn on a banker, payable to order on demand. Protection of
s. 60

While referring to section 60, there is another point

CHAP. XII worth mentioning from the point of view of the paying bank. The recent Gordon decisions dealt with the position of the collecting bank, and are reviewed in the next chapter. From one aspect of these cases it appears that in event of the collecting bank being liable to the true owner of cheques that have been deposited upon a forged indorsement, it may, nevertheless, as paying bank, escape liability by force of section 60, *in the case of those cheques which are drawn upon itself*; for in the case of those cheques it is also the paying banker. And, if the paying banker is to go scot free, that is incompatible with making him liable in another capacity. I must confess that to me the decision does not seem reasonable, and a distinction seems clear between the functions and consequent liabilities of the same bank when paying and when collecting. What I have stated, however, appears to have been decided by the Court of Appeal, and may be useful to the large banks, who receive many cheques drawn on themselves.

Cf. *post*, pp.
194-197.

So far I have dealt only with the ordinary cases. It is the case, however, that sometimes one meets in practice unusual crossings which are not authorised by the Act. Of such a kind is a crossing "for the account of John Jones," or "account payee."

It may be asked whether the paying bank is bound to see that the right account has been credited by demanding of the bank presenting the cheque an indorsement to that effect. It does not appear that this course is necessary. Applying the reasoning which was used in *Bellamy v. Marjoribanks* and *Smith v. Union Bank*, it would seem that the drawer of the cheque has issued a legal document, a cheque, which can be negotiated and transferred from party to party indefinitely until no one can tell from what quarter it may be presented. Upon it is a crossing unknown to the law. If the crossing does not effectually prevent the negotiation or transfer

Ante, pp.
153, 156.

of the cheque, the paying bank ought not to be limited from paying it through ordinary business channels—except, of course, that the special crossing, which has statutory sanction, must be complied with. CHAP. XII.

The better opinion seems to be that, if the courts of law gave any effect to such a crossing, it would be to regard it as a memorandum directed to the bank with whom the cheque was deposited for collection, and calculated to put such bank on guard. In Queensland there is a section which does give such effect to these crossings. Crossing a/c. Payee, and see ante 159, and post p. 175.

With regard to all irregular instruments in the nature of cheques or bills, it is worth remembering that if they are not contemplated by the Bills of Exchange Act there can be no statutory duty nor statutory protection in respect of them; and, with regard to fulfilment of the contract between bank and customer, the ordinary banking contract does not entitle the customer to draw, nor require the bank to pay, anything but usual and regular documents. If a customer persist in drawing instruments with unusual terms or conditions in them, the bank can refuse to comply with such conditions; of course, any answer should be carefully worded, so as not to injure credit; and if irregular or unusual orders drawn by a customer have been paid, and a course of dealing thereby established, it would be very unwise to act otherwise without first communicating with him. This applies equally to irregularities in crossings or in the body of the instrument.

To settle any point, in relation to the liability of a bank in respect of crossed cheques, which arises upon the meaning of the Bills of Exchange Act, there are two important rules which should be borne in mind.

They are:—(1) When an Act speaks of a banker, it ordinarily means a banker acting in his capacity as such in correlation with a customer; of course, transactions which are purely in respect of bank premises, or

CHAP. XII. purely between a banker and his staff or his branch offices, are not in this sense of the word dealings of a *banker*. (2) All the statutory provisions of the crossed cheques sections for the protection of the banker are designed to counteract some risk imposed on the banker for the benefit of customers by those sections. These two canons of construction are very much relied upon by Mr. Arthur Cohen, K.C., and Sir John Paget in lectures and opinions on banking. But the latter purports to think these canons somewhat at a discount since the decision in the *Gordon cases*. Though the second appears to have been expressly made use of in the Court of Appeal. The application of these rules can be made to appear more clearly in relation to the protection to the collecting banker.

As to the more general duties of the paying bank, see *ante*, Cap. XI., and the grounds for refusal of a cheque, p. 148.

CHAPTER XIII.

CROSSED CHEQUES—THE COLLECTING BANK.

We come now to a consideration of the 82nd section CHAP. XIII.
of the Bills of Exchange Act. Of all the crossed cheques sections of the Act, this is the one which affords some measure of protection to the collecting bank.

In the first place, it will be well to point out what it is from which the bank requires protection. In what way is the collecting bank in any danger or need of protection, provided it does its work properly for its own customers who lodge cheques? The answer to that question is: The bank is liable to an action at law to recover the value of the cheques at the suit of their true owner, supposing them to have been deposited by one who was not the true owner. Usually, of course, the customer who deposits cheques is the true owner, but sometimes, by accident or by design, the customer who deposits cheques has a flaw in his title to them or no title at all, and the bank, in obtaining the proceeds and placing them at the disposal of such a depositor, is dealing with such cheques in a manner inconsistent with the rights of the true owner. This is an act of *conversion* on the part of the bank. The depositing of such cheques for his own credit is also conversion on the part of the depositor, but the true owner generally prefers to sue the bank. No doubt the depositor is more directly guilty than the bank, which is usually morally innocent and very much in the position of an agent; the bank, however, is more than a mere agent; it does not carry the cheque to the

CHAP. XIII. paying bank and then carry the actual cash proceeds to its customer and hand them over as a servant would. What the bank does is to receive the proceeds (or credit for them) through its exchanges and to credit the customer in account, using the proceeds to swell its own funds, which it manages as it pleases. But it does not matter much from what point of view or in what language the conduct of the banking operation of collection is described, for it is now well-settled law that in such cases there may be conversion by the bank.

The preceding paragraph must not be taken to convey that a bank cannot be a mere "agent for collection"; transactions are often carried out in such a way as to make the bank an agent for collection simply, in the sense in which that phrase is used to test rights under the Act.

Chattel
features of
cheques.

There is another anomaly which deserves explanation. A cheque is a chose in action, and it is anomalous that anyone can be guilty of conversion of a chose in action; but a cheque may be regarded as made up of two parts, a chattel part and a chose in action. The real value of the cheque is the chose in action—the right to receive payment of the sum of money for which it is drawn. If a person is sued for conversion of a cheque, it must be for the chattel part—the mere written instrument—but the law will not allow him to purge his conversion by handing back the spent document or proving that it is now valueless; the law will find him liable for damages for his act of conversion, and apply as the measure of damages the value received upon the cheque. All this is a little roundabout and curious, but it has become the law, and in the language of Lord Lindley in the Gordon cases, "a long series of well-established authorities, which cannot, I apprehend, be now questioned, establishes the liability of the bank beyond all dispute."

1903, A.C. at
p. 247, and cf.
1897, 1 Q.B.
p. 156,
Lacave v.
Crédit
Lyonnais.

When such actions are brought against a bank, the

plaintiff usually inserts in his statement of claim or declaration, not only a count for conversion, but also a count for "money had and received to the use of the plaintiff," so as to include instances, if any, where the bank has obtained money for cheques which were the plaintiff's property, even though the facts may not amount to conversion. CHAP. XIII.

It must never be forgotten that any defect of title, however great, is cured by the honest negotiation of a negotiable cheque. And therefore, if one acquires negotiable cheques honestly, giving value for them, there can be no conversion in that; on this ground the banks were, in case of such cheques, successful in the Gordon cases.

Coming now to the language of the section, it is as follows:—*Section 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."* Protection to
collecting
banker.

On the face of it, this section is clear and well expressed; one could not suppose there would be much doubt as to its meaning, or that it would not be easy in most cases to say at once whether a particular case was within its protection or not.

In the multiplicity of banking transactions, however, and the putting through of millions of cheques, a great many cases have arisen in which the chief question has been the meaning or application of this section.

The result is that among all the English statutes this is one of the most litigated of sections.

I propose now to go through the section, pointing out those parts or phrases in it that have been explained in courts of law.

CHAP. XIII.

Where a Banker.—At the conclusion of Chapter XII. it was pointed out that the word “banker” in these sections means banker in correlation to a customer—a banker acting as such in ordinary banking business. Upon this principle, a banker, when acting outside the ordinary scope of banking business, would not be allowed to claim the benefit of this section. This is illustrated in *Gillespie v. International Bank of London*. The plaintiff in this action was the trustee for the creditors of a swindler, T. T had purported to sell cattle, to which he had no right, in London, and received therefor cheques for £283. Apparently he was working in conjunction with a cousin in Hamburg, to whom he sent these cheques. They were indorsed by T, then by T and Co., and reached the International Bank, London, for collection from a German bank in Hamburg; they were presented and dishonoured, answer “payment stopped” (the respective drawers having meanwhile discovered fraud); the International Bank thereupon had the cheques protested and noted and returned to their principal in Hamburg. Up to this point the ordinary course of business had been followed. Following upon this, a man named Oppenheimer wrote to the International Bank and stated he was solicitor to T and Co., that his clients had got the cheques for value, and would the bank collect the amounts? This the bank undertook to do, requesting that previous indorsements should be cancelled and the cheques indorsed to itself, which was done. By the aid of their solicitors in London the Bank collected the cheques, and transmitted proceeds to Oppenheimer. Gillespie then sued the bank. Particulars of the case and the facts are not fully and clearly reported; at the trial, however, the bank relied upon one defence only—namely, that it was entitled to the protection of the 52nd section. This was refused on the ground that the transaction was outside the scope of ordinary banking business in London, evidence to that effect having been given.

1888, 4
T.L.R., 322.

In Good Faith.—There do not appear to be any reported cases where a banker was refused protection for lack of good faith. CHAP. XIII.

And Without Negligence.—This expression has received careful examination in two important cases. Ordinarily a bank's duty or neglect of duty is towards its customer, with whom it is in contractual relationship. But the negligence contemplated in this section must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests of the true owner—not of the customer who purports to have the authority (to lodge the cheques), but of the principal, whose authority he purports to have—the section being framed wholly with reference to the liability of the banker to the true owner of the cheques, and not with reference to his liability to his customer. This explanation was first given by Lord Denman in *Bissell v. Fox*,^{1884, 53 L.T., 193 (51 L.T., 663).} and adopted in the Court of Appeal. In that case the Bank collected six other bank cheques drawn in favour of Bissell. S, who was a commercial traveller for Bissell, received these cheques without authority, and without authority indorsed them “Bissell pp S,” and paid them in to his own account with Fox (the banker). All Fox's staff knew that S was a commercial traveller, but did not know of any authority on his part to indorse for Bissell. Under these circumstances, it was held the bank was negligent and without protection.

A similar case turning upon the absence of authority to indorse was *Hannan's Lake View Central, Ltd., v. Armstrong and Co.* ^{1900, 16 T.L.R., 236; 5 Com. Cas., 188.} *Armstrong and Co.* were a private bank in London, and were bankers for one Montgomery, the secretary of Hannan's Company. Montgomery deposited for credit of his account, and Armstrong and Co. received, a cheque for £542 drawn in favour of Hannan's company or order, and crossed generally; the cheque was indorsed by Montgomery as follows: “Hannan's Lake Ante, p 77.

CHAP. XIII. View Central, Ltd.—Montgomery, Secretary''; it was really the property of Hannan's Lake View Central, Ltd., and was misappropriated by Montgomery. The bank made no inquiry, but collected the cheque, and in due course made the proceeds available to their customer. The fact was that the secretary had only an authority to indorse of the most limited nature, if any. He had been permitted to indorse cheques received by the company to secure their collection through the company's own bank; beyond this fact no authority in him could be discovered.

It was held, as in *Bissell v. Fox*, that the bank were negligent with regard to the interests of the true owner, and had lost the protection of section 82. In finding the bank to be negligent, the following facts were relied upon: (1) Large amount of the cheque; (2) the cheque on the face of it belonged to Hannan's company; (3) defendant bank already knew Montgomery was a paid servant of the company; (4) and knew also that Hannan's company had a bank account of its own; (5) no previous similar transaction had been undertaken for this customer; (6) such a transaction could not be usual between a company and its secretary; (7) the bank knew that Montgomery was paid his salary by the company's cheque.

Sec. 24.

Of course these two cases are consistent with and were in part determined by the law, expressed in another section of the Bills of Exchange Act, that an indorsement "per pro" operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such an indorsement if the agent in so signing was acting within the actual limits of his authority.

Another illustration of negligence will occur where the collecting banker takes a cheque requiring indorsement, which has been indorsed, but upon examination the indorsement turns out not to correspond with the name of payee.

The London and South-Western Bank collected a document, the indorsement on which was T. Bavins, Trench and Sims, but the payee was T. Bavins, jun. and Sims; the writing was so bad that the discrepancy might easily escape notice, and the mistake was one which could easily occur in the hurry of business, and the Judge of first instance thought there was no negligence, but upon appeal three Judges agreed that this amounted to negligence. Such a case seems hard for the bank, and is clearly not far from the line.

CHAP XIII.
Bavins, jun.
and Sims v.
London and
S.W. Bank,
1900, 1 Q.B.
270, at p. 272,
note.

A still further class of cases where negligence may be found in the conduct of the collecting bank is in reference to cheques crossed "a/c Payee." In the previous chapter I expressed the opinion that this crossing does not bind the paying bank, but operates as a notice to the collecting bank*; if this be so, it might be negligent for a bank to receive such a cheque for collection for someone other than the payee without first satisfying itself by inquiry of the good title of the depositor.

Qld., ante,
pp. 159, 166,
167.

In all these instances under the head of negligence you will notice that the responsibility is thrown, in the first instance, upon the clerk receiving any such cheque—that is, usually upon the receiving tellers.

If receiving tellers would keep their banks free from liability in this respect, it is necessary for them to observe that degree of care indicated by the foregoing cases. On the other hand, as Sir John Paget points out, there is the difficulty that you cannot afford to show suspicion of your own customers. In a case of strong suspicion, no bank stamp should be placed upon the cheque till your course of conduct is decided upon.

* Since going to press this view has been expressed judicially in England, per Channell, J., *Bevan v. Capital and Counties Bank*, 23 T.L.R. p. 65.

CHAP. XIII.

What
constitutes
a customer?

1897, 1 Q.B.
148.

Receives Payment for a Customer.—This phrase covers two points: (1) Who is a *customer*? (2) What is receiving payment *for* a customer? (1) As to the term “customer.” In the case *Lacave v. Crédit Lyonnais*, the *Crédit Lyonnais*, a French bank doing business in London, had collected in London a cheque for £600, the property of Lacave and Co., and were liable to Lacave and Co., unless they had the protection of section 82; to come under that section it was necessary for them to show that one Ponce, who had left the cheque for collection with their Paris office, was a customer.

It was contended that the section could not be taken to limit the protection to the case of the cheque being collected for a customer in the ordinary sense—that is, a person who kept an account at the bank—but that it must be used in a larger sense of the word, so as to include anyone who comes to the bank with a cheque and asks it to collect that cheque for him. It was admitted that unless the word had that larger meaning, Ponce could not be brought within the definition of customer. The Judge was clearly of opinion that Ponce was not a customer; he thought the Act meant what it said, and that for obvious reasons protection is only given to a bank which does collect for a customer in the real sense, if he is a person who has an account at the bank, at all events if he is a person whose relations are much nearer and closer than were those of Ponce in this case.

1901, A.C.
414.

This question, what constitutes a man a customer of a bank, was further elucidated by the decision in the case *Great Western Railway Company v. the London and County Bank* by a decision of the House of Lords. The man whose status was reviewed in that case, Huggins, had obtained by false pretences (of which he had been convicted), or by larceny, a cheque intended for the benefit of his employers. He therefore had no title or a defective title to the cheque; and it was crossed

“not negotiable.” Huggins took this cheque to a branch of the defendant bank; at his request the bank paid £25 to credit of the Wantage Rural District Council, and the balance of the cheque, £117 10s., to himself in cash across the counter. The branch subsequently collected the cheque through its head office in London. For twenty years this branch bank had at intervals cashed cheques for Huggins in the same way, generally and perhaps always giving him in cash part of the proceeds, and crediting in part, at his order, the balance to a current account, such as that of the Wantage Rural District Council.

The House of Lords held that Huggins was not a customer.

Upon this point the following paragraphs are extracted from the judgments delivered:—

Lord Davey said: “I do not think the relation of customer and banker was ever established between him and the respondents. It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account, either a deposit or current account, or similar relation, to make a man a customer of a banker. On the facts proved in this case, I do not think the respondents (*i.e.*, the bank) undertook any duty towards Huggins. They took the cheque he offered in payment of a sum to be placed to the credit of their customers and gave him the change, or in some cases, though it is not proved, they may have bought his cheque, possibly for their own convenience in remitting to head office. But this will not, in my opinion, prove that Huggins was a customer, or that they undertook to collect the cheques on his behalf, so as to bring them within the protection of section 82.”

Lord Brampton said:—“Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential

CHAP. XIII. to constitute a person a customer of a bank, for if it were shown that the cheques were habitually lodged with a bank for presentation on behalf of the person lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such a person a customer within the meaning of the 82nd section. But as between Huggins and the Wantage branch of respondent's bank the transactions amounted to nothing of the sort."

Lord Lindley said: "I cannot think that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank. Nothing was put to his debit or credit in any book or paper kept by the bank."

So much for the word *customer*; you will notice that there is no peculiar definition of customer in the Bills of Exchange Act, and that the observations of the Judges are of a general character.

Receiving
payment for
a customer.

(2) The case we have just been dealing with leads to the second point covered in the sentence "receives payment for a customer." For in this case the Court held that, independently of the question whether Huggins was a customer or not, the bank did not receive payment *for him*, but for itself. Of course, the facts showed the bank had become a holder of the cheque for value. The judgment, therefore, rested upon two legs, as it were, either of which alone was sufficient to remove whatever support the bank expected from section 82.

But this point has been fatal to the collecting bank in cases of much wider application, and where the facts are nearer to everyday practice. The great example of this is in the Gordon cases. These were the cases of

Gordon v. Capital and Counties Bank and Gordon CHAP. XIII.
v. London City and Midland Bank. They were cases 1902, 1 K.B.
 arising out of the frauds of one Jones, who was 242.
 a clerk of Gordon, who traded as Gordon and Munro. 1903, A.C.
 Jones had no authority to indorse for Gordon and Munro, 240.
 but stole many cheques forwarded to Gordon and Munro,
 and where the form of the cheque rendered it necessary,
 forged the indorsement of the firm. These cheques he
 deposited to the credit of accounts of his own at branches
 of the two banks, who were the defendants. Unknown
 to his employer, he was carrying on a small business
 in Birmingham, and it was, or purported to be, in con-
 nection with this business that he kept these accounts
 with the defendant banks. Both banks acted in good
 faith and without negligence, and Jones was their custo-
 mer. The sole question with regard to the great
 majority of the cheques was, Did the banks receive pay-
 ment for their customer?

And see next
chapter.

Now, in every case the cheques had been carried to Jones' credit immediately upon deposit, and in the case of each bank he had been allowed to use and had used this credit without being compelled to wait till the bank had received proceeds of the cheques. Sometimes he had put his own indorsement upon the cheques when paid in, though this could not have been necessary for purposes of collection. In the case of the London City and Midland Bank, Jones was allowed to draw against these cheques as soon as credited, and but for this arrangement his account would have been almost continuously in debit. In the case of the Capital and Counties Bank, no evidence was given of any such arrangement, but upon examination of the account it appeared that in several cases, on the same day on which cheques were paid in, Jones drew cheques against those deposited, to an amount which would not have been met but for the credit obtained in respect of the cheques paid in by him.

CHAP. XIII.

A question of fact in each case.

Cf. *post*, 184, 186.

In both cases it was held, both in the Court of Appeal and in the House of Lords, that the bank did not receive payment of these cheques for a customer, but to some extent, perhaps chiefly, for itself, and therefore could derive no protection from section 82. It was thought by Judges in both Courts that to be within the section the banker should receive payment as a mere agent for collection. From reading all the judgments carefully, it appears to be a question of fact in each case whether the bank does receive payment for its customer or not.* But there are passages in the judgments which are in very general terms, and which go to show that the crediting of cheques as cash is sufficient to disentitle the collecting bank to the protection of the statute; thus, in the Court of Appeal the Master of the Rolls said: "If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques, and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash and upon receipt of them at once crediting the customer with the amount of them in the ordinary way, instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer, I think they are collecting

* NOTE.—This is well shown in a very recent case—though one no doubt in which the constitution and business of the bank was peculiar—where it was held that mere ledger entries did not constitute credit, and that where the customer was never allowed to draw against cheques paid in until cleared, nor credited with them in his pass-book until clearance, the bank was in the position of an agent for collection and enjoyed the protection of section 82 in spite of the fact that in the ledger credit entries were passed immediately upon deposit of the cheques. In this case the customer upon opening his account signed an application form which contained a notice that no bills would be discounted and that cheques would not be paid against until cleared.—1904 Decision of a single judge, Bigham, J., *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, and cf. *post*, p. 184.

the money not merely for their customer, but chiefly for themselves, and therefore are not protected by section 82." And in the House of Lords, Lord Macnaghten said: "It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account, the banker becomes holder for value of the cheque." And Lord Lindley: "It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

Another feature of the judgment is the way in which it illustrates the principle referred to at the end of last chapter that the protection given by the crossed cheques sections is designed to compensate for the duties imposed by those sections and nothing more; thus the passage just quoted from the judgment of the Master of the Rolls is prefaced by the sentence, "The protection afforded by section 82 must be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers." Then follows the passage already quoted, and the whole meets the approval of Lord Macnaghten in the House of Lords.

The duty referred to is not laid upon bankers in express terms, but becomes a practical necessity by the law that crossed cheques can only be paid through bankers. This judgment is of great importance for us; for in Australian banking it is, I believe, the universal practice to credit cheques to depositor's account at once.

In Paget's work it is pointed out that at the date of the Gordon decision (1902) the position adopted by bankers who followed the system of crediting as cash involved various incongruities.

Inconsistent
claims by
bankers.

"They claimed—

CHAP. XIII.

- (1) That the crediting as cash constituted them holders for value, apart from the condition of the account;
- (2) That they were nevertheless within the protection of section 82 with regard to crossed cheques so credited;
- (3) That they had the right to debit the customer's account with the amount of a cheque so credited if dishonoured;
- (4) That they had the right, after so crediting a cheque, to return a cheque drawn against it by the customer with the answer, 'Effects not cleared.'

And taken separately there was authority for each proposition."

Now, we know that in Australia the banks take up the positions (2), (3), and (4) described above. I do not know, however, of any reported case where a bank has taken in Australia the position (1) described above.

Royal Bank
of Scotland
v. Tottenham
1894, 2 Q.B.
715.

*Ex p. Rich-
dale in re
Palmer,*
1882, 19 Ch.
D. 409.

In England prior to the Gordon cases, banks had done so in actions in the law courts, and had established the right to enforce payment from the drawer of such a cheque when dishonoured, in place of charging the cheque back to the customer who paid it in, if that course seemed preferable; indeed, in a case where the amount of the returned cheque had been charged back to its customer, a bank nevertheless succeeded in an action against the drawer.

It is only fair that banks should not in the same transaction be allowed to take up either the position of holder for value or of agent for collection at their choice as, after the event, may turn out to suit them best.

Also it is clear that in the case of deposit of fraudulently-obtained cheques which are payable to bearer and fully negotiable, it suits the bank very well to be holder for value, for then there is no question of conversion;

See *post*,
p. 194.

and this was illustrated with regard to some of the CHAP. XIII.
cheques in the Gordon cases.

Now, it seems that the positions (2), (3), and (4) can consist together without violence, but it is certain that they cannot all three be consistent with position (1); and, in particular, that (2) the protection of section 82, and the right to refuse cheques prematurely drawn (unless under an express arrangement) (4), cannot stand where the bank has become holder for value.

The proposition that the bank cannot be a collector for a customer and a holder for value at the same time is the principal feature of the Gordon cases; the proposition that it cannot treat a customer as not entitled to draw, when it has given him credit for his deposit and thereby become a holder for value, seems a necessary corollary of the Gordon cases, and the matter is so treated and so decided in a South African case printed in "The Journal of the Institute of Bankers of New South Wales," April, 1905. That decision seems a necessary one upon authority, and the same result might be reached in any country under similar law, unless the actual facts or express contract show that the mutual rights of bank and customer are different from those in the Gordon cases. Corollary to
Gordon cases.

It is therefore of great importance and interest to know whether in Australia the usual arrangements between a bank and its customer are distinguishable from those cases or not. For, while a decision of the House of Lords is final and irrevocable, except by Act of Parliament, and while it would be futile and dangerous, as Sir John Paget points out, to attempt to minimise the effect of such a decision, still it is all-important to discover its scope. Australian
practice
compared
with facts of
Gordon cases.

Now, in this country we all know it is usual to print on deposit slips a notice that cheques are not to be drawn

CHAP. XIII. against until cleared; therefore, where such a notice has reached the customer, and it cannot be shown that a contrary practice has obtained between that bank and that customer, I think that in such a case the bank can return if necessary that customer's cheques unpaid, with answer "effects not cleared." And I go further, and say that such a notice can be so drawn and so acted upon as to furnish evidence that the credit was provisional only, and that the bank was not holder of the cheques deposited, except as agents for collection.* And where the right to return cheques with answer effects not cleared is conserved, it would appear, that credit, though in fact entered to the customer, has not yet been made *available* to him; and this must be the real test,† for, otherwise, how has the bank given anything whereby to become holder for value of the cheque?

Effects not cleared.

Availability of credit the real test.

1903, 1 A.C. at p. 244, and McLean v. Clydesdale Banking Co., 1883, 9 A.C. 95 at p. 115.

It must be borne in mind that whenever banking practice here is in question before the courts, it will be reviewed in the light of a particular case, and that a contract which a bank has with Smith is not its contract with Brown, though they may be similar. The Gordon cases show that each case must stand upon its own facts, and that on somewhat different facts, it would have been possible for a jury to properly find that the banks received payment for their customer. No doubt a case may be typical of a class, and the Gordon cases are typical of certain cases that may be found in any Australian capital. But what I point out is that the Australian or the Melbourne or Sydney practice cannot be tried as a whole. That in any case which may come before the courts the practice as to notice to customer

* See note at end of page 180.

† Since going to press this view has been taken judicially in England by a single Judge, who thought that, when the House of Lords talked about credit being given, it meant credit being effectively given. Channell, J., *Bevan v. Capital and Counties Bank*, 23 T.L.R. 65.

per medium of the deposit slip furnishes one differentiating element from the Gordon cases, and that the collecting bank may still arrange its books with an immediate credit entry to its customer, and still have the protection of section 82. At any rate, the contrary has not been decided. In no case, however, should the entry be recorded in the ledger as "by cash" or any equivalent expression, as I am afraid is sometimes done, especially when the cheques deposited are included in a deposit of notes and cash made at the same time. The more usual and customary entry by the name, or initials, of the actual depositor follows a safe course.

Amending Acts.—The practice of crediting cheques deposited is so general that bankers all over the world were alarmed by the Gordon decisions. And Amending Acts were passed by many Governments.

In England, the amendment is as follows:—

"A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." (*Act 6 Edw. VII., c. 17, s. 1.*)

In Victoria,

"A banker shall not be deemed to be disentitled to the benefit of the provisions of section 83 of the Principal Act by reason only of the fact that before receiving payment for a customer of a cheque crossed either generally or specially to such banker he has credited the account of the customer with the amount of such cheque." (*Instruments Act, 1904, s. 3.*)

In Queensland the section of the Principal Act was repealed, and the following enacted in lieu thereof:—

Where a bank in good faith and without negligence receives payment for a customer of a bill or note, and the customer has no title or a defective title thereto, the bank

CHAP. XIII. shall not incur any liability to the true owner of the bill or note by reason only of having received such payment.

In the case of a cheque, a bank shall be entitled to the benefit of this section, notwithstanding that, before receiving payment for the customer of such cheque, the bank has credited the account of the customer with the amount of such cheque or any part thereof, or allowed the customer to draw against such cheque. (*Bills of Exchange Amendment Act, 1905, s. 3.*)

In New South Wales, some similar amendment is probable, though none has yet been enacted (Apl., 1907).

A close reader will observe that the English and Victorian statutes may be read as dealing only with the question of entering credit, and not with the availability of credit; and in this view, if the decision in *Akrokkeri Mines v. Economic Bank*, ante, p. 180, be sound, and, if the Gordon cases are read as applicable only to cases where credit has been made available immediately, it is quite possible to argue that where banks really do become holders for value, as in the Gordon cases, no change has been made in the law; but the Queensland Act clearly goes further.

It is a great pity the amendments are not in precisely the same language in each State. A great advantage gained by the adoption of the Bills of Exchange Act was uniformity of law.

(4) *Of a cheque crossed generally or specially to himself.*—This includes all crossed cheques, whether marked “not negotiable” or not; formerly it was possible to argue that not negotiable cheques only were referred to. The section was then somewhat differently worded.

Cf. Gordon cases, *supra*, and next chapter.

Further, it has been made clear by decisions that the expression “crossed generally or specially to himself” refers to the condition of the cheque as it comes to the hand of the banker, and cheques which are un-

crossed when they reach the collecting bank cannot be brought within the section by any crossing placed there-
on by the bank. CHAP. XIII.

(5) *No title or a defective title thereto.*—This may be illustrated by the *Great Western Railway v. London and County Bank*, before referred to. If in that case Huggins had got the cheque by larceny, he had no title thereto; if by false pretences, he had a title, though defective, and transferred such title as he had to the bank, and no more, for the cheque was not negotiable; and, the flaw in title being exposed, it could not avail the bank to claim immunity as a holder for value. As has been shown, it was unsuccessful in claiming the protection of the section.

(6) The banker shall not incur any liability to the true owner of the cheque by *reason only of having received such payment*. Under these concluding words of the section it has been claimed that a bank may have committed an act of conversion, for which it should be liable, by stamping with its own name cheques deposited with it in contravention of the rights of the true owner, and that from such a conversion it would not be exonerated by the section, which only gives the bank relief from the liability it may incur by reason only of having received such payment. Against this we may place the language of Lord Macnaghten in the *Gordon* case: "The section would be nugatory—it would be worse than nugatory; it would be a mere trap—if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result." 1903, App. Cas., p. 240.

Apart from the statutory position of the collecting banker, there is the duty of due diligence owed by the Due diligence
Cf. Chap. XV.

CHAP. XIII. bank to the customer for whom it collects; proper care must be shown in the speedy collection of the cheque, in carrying the proceeds to the right account, or in giving due notice of non-payment if that has been its fate.

CHAPTER XIV.

THE COLLECTION OF CHEQUES: ANALYSIS OF THE GORDON CASES.

The recent Gordon cases, *Gordon v. London City and Midland Bank, Ltd.*, and *Gordon v. Capital and Counties Bank, Ltd.*, affected such important points of banking practice, and such various classes of cheques, that an analysis of the results of those cases can hardly fail to be useful. The decision is a storehouse of illustration of this branch of banking law. CHAP. XIV.
1902, 1 K.B.
242.
1903, A.C.
240.

These were two cases which arose out of similar transactions, and which were heard and argued together. They were cases where two parties, both innocent, were left to bear the loss occasioned by a fraudulent clerk, and litigated to find upon whom it should fall. Gordon, the plaintiff, carried on business at Birmingham, under the style of Gordon and Munro, and had employed one Jones, for about ten years, as a ledger clerk. It was Jones' duty to take the business letters from the letter-box daily, and place them on the plaintiff's desk. When customers remitted cheques, the plaintiff used to enter same in his cash book, and pay them into the bank; but when he was absent from business, Jones was authorised to open the letters, and put all cheques and remittances on one side, to await plaintiff's return. Jones had no authority to indorse cheques in plaintiff's name, or to deal with them in any way. Jones carried on a small business on his own account, and had an account at the Sparkbrook branch of the London City and Midland Bank.

CHAP. XIV.

Between August, 1895, and February, 1899, Jones on various occasions stole a number of cheques from letters, which had been delivered through the post at plaintiff's office, indorsed such as were drawn to order with the name of plaintiff's firm, and paid them into his own account. The defendant bank gave Jones immediate credit for these cheques. Jones used to bring the cheques to the bank with the forged indorsement of Gordon and Munro upon them; he used then to add his own name. It was admitted in evidence by the Sparkbrook branch manager that, had Jones not indorsed the cheques before paying them in, he would probably have been required by the cashier to do so. Some of the cheques were crossed before receipt by the bank, and some not. All were subsequently crossed by the bank with a rubber stamp—"The London City and Midland Bank, Limited, Sparkbrook, Birmingham, to Head Office, London." This was done as a precaution against dishonesty, the effect being to make the cheques payable to or through the head office only. Those cheques which were drawn upon defendant's own bank were collected by the ordinary book-keeping process of debit and credit at the defendants' head office and the amounts of them placed to the credit of the Sparkbrook branch.

In the second action—viz., against the Capital and Counties Bank—the facts were the same, except that Jones had not indorsed with his own name all the cheques paid in there. Also the cheques were less numerous. They fell, however, under the same headings, and judgment in the second case, therefore, followed the judgment in the first.

But for the fact of Jones being allowed immediately to draw against his deposits, his accounts would have been constantly in debit.

The table below shows the way in which the cheques were classified for purposes of argument and in the judgment:—

| Kind of Cheque or Instrument. | Reference No. in Judgment. | State as to Crossing at time of deposit. | How Payable. | Notes. |
|---|----------------------------|--|-------------------|--|
| Other bank cheques ... | 6 | Crossed | Plaintiff's order | The largest class. Also marked not negotiable. |
| „ „ | 5 | „ | Plaintiff's order | |
| „ „ | 1 | Not crossed | Plaintiff's order | |
| „ „ | 2 | „ | Bearer | |
| „ „ | 7 | Crossed | „ | Only one cheque. |
| Cheques on the same bank whether at head office or branches ... | 4 | „ | Plaintiff's order | |
| Drafts by another branch on head office | 3 | Not crossed | Plaintiff's order | |
| Orders on other banks | 8 | Crossed | | These were to be paid upon signature and presentation of a receipt attached. |

With regard to all the cheques, it was quite clear that Jones had wrongfully converted his master's property to his own use, and that the bank who got the cheques from Jones was also liable to the true owner for conversion unless protected by the doctrine of negotiability or by the special provisions of the Bills of Exchange Act.

It was under these circumstances that Gordon sued the bank to recover the value of the cheques.

With regard to class (6), which consisted of cheques O. B. cheques drawn upon other banks crossed to plaintiff's order, and payable to order and was the most important class, it was claimed that the crossed. bank was freed from liability by section 82 of the Bills of Exchange Act, which provides that "Where a banker Act s. 82. in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially

CHAP. XIV. to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

It was pointed out in the judgment that the protection given by the Act was to bankers when acting as agents for collection—that is, when receiving payment for a customer, not for themselves; that in this case the bank had acquired the cheques as holders for value, having given Jones immediate credit for them. This view was held by the Judges independently of the fact that the bank had taken Jones' indorsement, and therefore applied to all the cheques. The fact of Jones' indorsement being taken, however, only strengthened that view, for it was impossible to believe that the bank, in cases where Jones had indorsed, did not intend to have recourse upon him—a thing which a mere agent for collection would not require, and which was not at all necessary for performance of the duty, which, by the legislation as to crossed cheques, was imposed upon bankers—i.e., the receipt of crossed cheques and of payment for them as agents for collection for their customers. If a banker then treats cheques as cash, he is not merely collecting for a customer, and is therefore not within the protection of section 82. It was pointed out that the view that giving a customer immediate credit in account with the amount of a cheque constitutes the bank holders for value of the cheque, had already been pushed to its logical conclusion in the case of *Royal Bank of Scotland v. Tottenham*, where, the cheque being unpaid, the bank was allowed to sue the drawer.

This is discussed, *ante*, pp. 178, 180.

1894, 2 Q.E. 715.

O.B. cheques payable to order and non-negotiable.

As to class (5), these cheques were like those in (6), and marked "not negotiable" in addition; the bank could not, therefore, be in any better position with regard to these cheques than in the previous case, and judgment was against the bank.

Class 1.—These cheques were uncrossed when paid in; after receipt by the bank they were crossed with the bank's rubber stamp, as already detailed. It was claimed on behalf of the bank that this might be done (which was true), and that the cheques were then crossed cheques within the 82nd section. The Courts held that such crossing did not make the cheques crossed cheques within the protection of the 82nd section. This does not seem to have been at all necessary to the judgment, for, in the view which the Courts took, the banks—having themselves acquired the cheques for value—were not *collecting for a customer*, and that was enough to stop them from enjoying the protection of section 82. Two Judges in the Appeal Court, however, did touch upon this question of crossing, and I quote a portion from their remarks.

CHAP. XIV.

Uncrossed
order
cheques.What is
meant by
crossed
cheque in
s. 82.

Collins, M.R., said: "They took the cheques, which were not then within the section, and dealt with them in such a manner as, according to the authorities, to constitute a conversion of them to their own use. They cannot purge that conversion and put themselves in any better position by subsequently crossing the cheques themselves. As to that class, therefore, I think our judgment must be for the plaintiff."

Stirling, L.J., said: "Section 77, sub-section 6, cannot, as it appears to me, afford any protection to the bankers in this case, because it only provides that where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself. Therefore, where the banker simply acts as agent for the collection of a cheque, he may protect himself against dishonesty by crossing the cheque specially to himself; but here the defendants did not act merely as agents for collection, but assumed the position of holders of the cheque for value."

And in the House of Lords, Lord Lindley said: "It

CHAP. XIV. appears to me that section 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking protection of that section. Section 77, clause 6, does not assist the appellant bank in the present case, although it might be useful if an indorsement were forged after a crossing."

Although these remarks have their value in expounding the meaning of "crossed cheque" in section 82, it is clear they were quite immaterial to the decision, which proceeded on the ground that the banks had acquired the cheques as holders for value. As holders for value, the banks were, of course, entitled to put what crossings they pleased upon the cheques.

The cheques in this class were really then governed by the same consideration as those in class (6).

Open bearer
cheque.

Class (2) consisted of one cheque; consistently with the view taken by the Appeal Court, in regard to all the classes of cheques in question, it was held that the bank were not collectors for a customer, but had received the cheque for value. Now, it was an open cheque, freely negotiable, acquired by the bank bona fide and without negligence, therefore the bank was entitled to obtain payment and retain the proceeds. Judgment in this instance for the bank.

Crossed
cheques pay-
able bearer.

Class (7), like class (2), consisted of negotiable instruments acquired by the bank bona fide and for value, but differed from class (2) only in being crossed, but payment had been duly obtained. Judgment was for the bank.

Crossed order
cheques
drawn on
same bank.

Class (4) comprised cheques drawn by other customers of the defendant bank upon its head office or branches; payment of them was obtained by the Sparkbrook branch by remittance of the cheques to head office and cross entries made there. The Court held that this was a good payment of the cheques, and that the defen-

dant bank, as paying bank, was protected by section 60, CHAP. XIV.
which provides that, "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority"; this was not all, however, for the plaintiff had raised the point that, since crossed cheques cannot be paid otherwise than to a banker (section 79), and these cheques had not been paid to a banker, but in substance to the customer, the terms of section 79 had been violated; as to this point, the Court thought that payment had been made to a bank—*i.e.*, that the bank in such a case may be regarded in two capacities, *viz.* (*a*) as collecting banker, (*b*) as paying banker—in which case the legislation as to crossed cheques was satisfied by the transaction. Judgment, therefore, with regard to this class of cheques, was given for the bank, and depended on the following dilemma quoted from the judgment of Collins, M.R.:—"Either the case is outside the legislation as to crossed cheques which does not apply to a case where the circumstances do not admit of two banks being involved in the transaction, and so defendants are within section 60, or if the case is within section 79, the payment by one branch of the bank to the other satisfies the requirements of that section." Stirling, L.J., adopted precisely the same view as that given above, and the third Judge, Matthew, agreed generally.

When the case reached the House of Lords, this part of the decision was not further discussed, but the decision of the Lords gave a general approval to the judgment of the Court of Appeal.

CHAP. XIV.

Without doubt this reasoning is perfectly sound to demonstrate the immunity of the paying banker in such cases; but in this case the defendant bank was also the collecting banker, and the writer is unable to see how judgment in the bank's favour in that capacity is to be sustained by such reasoning. With respect to all the cheques received by the bank from Jones, the judgment proceeds upon the grounds that the bank acquired the cheques for value, and was thereupon liable to the true owner for conversion of such as were not, in the absence of his true indorsement, negotiable. Afterwards the cheques are paid and the paying bankers protected; but what happened after the conversion did not, in the case of other bank cheques, work any relief to the collecting bank. Why, then, should the protection of the Act be useful to them in the case of cheques drawn upon themselves, especially when it seemed feasible to the Court to distinguish between the bank acting in its capacity as collecting bank and in its capacity as paying bank?

The same criticism may be put in another way. Thus: The bank dealt with all the cheques in question in a manner inconsistent with the proprietary rights of the true owner, and was therefore liable at Common Law for conversion of all the cheques to which it had not acquired title by negotiation. Had the bank acted as a mere conduit pipe for collecting the proceeds and placing them at the disposal of its customer, this act of technical conversion would have been freed from liability by reason of section 82, in the case of cheques within that section; this, however, was not the case, and the conversion and its consequences stood. Subsequently the cheques are paid; the indorsements were forgeries: all the paying banks are excused of liability for payment upon forged indorsements (there having been no negligence) by reason of section 60. The collecting bank is the paying bank of some of these cheques, and gets the same

protection from section 60 as did all the other banks (i.e., the drawers cannot repudiate the charge against their accounts); but how can section 60, which, in respect of certain documents, relieves from the class of liability otherwise attending payment upon forged indorsements, be construed as relieving against acts of conversion anterior to payment? CHAP. XIV.

If this criticism be sound as the author submits it is, the decision in this part of the case may be expected to be explained away some day. The point is certain to recur by reason of its utility to the larger banks.

It is a little curious that the learned Judge upon whose judgment this part of the case mainly depended had decided an earlier case upon a line of reasoning like that above. Cf. *Lacave v. Crédit Lyonnais*, 1897, 1 Q. B. 148.

Class (3) consisted of drafts drawn by one branch of the bank on another; they were expressed to be payable on demand, and would, if within the Bills of Exchange Act at all, come under the heading of cheques. Inasmuch, however, as these documents are drawn by the bank upon itself, they are not "unconditional orders in writing addressed by one person to another," &c., &c., within the definition of bills of exchange. It was held that these instruments were not, *prima facie*, bills of exchange at all, and the bank who claimed the protection of section 60 was not, therefore, entitled to it. As to this class, then, judgment was for the plaintiff. Drafts by bank on itself.

The reasoning of this part of the decision was approved by the House of Lords; though the decision itself was varied upon consideration of a section of the English Stamp Act, which is not applicable in Australia.

With regard to this class of instruments—viz., drafts by a bank or its branches upon itself—it is of interest to note that bankers in Sydney had this matter under careful consideration about 1898, being especially

CHAP. XIV. anxious to know whether in the event of payment of such a document on a forged indorsement the bank would have the protection of section 60. By the kindness of Mr. Stewart, of the Australian Joint Stock Bank, who first drew my attention to the point, I have been allowed to see copies of the correspondence and opinions written on the matter at that time. The better opinion was to the effect that such instruments were not bills of exchange within the meaning of section 60, and the bank would, therefore, in such a case, be without any protection from that section; this was also the opinion of Messrs. Cohen, K.C., and Paget in 1888, and has remained unaltered in the fifth edition of "Questions on Banking Practice" (revised to end of 1897), where the opinion is printed at length, pages 30, 31, 32. This opinion seems now to be confirmed by the judgment as to class (3).

5 Boy. Cas.
79.

A document of this description was before the Supreme Court of New South Wales in Bankruptcy in the matter of *In re Piercy*, when it was said the bank would have been protected by section 60. In view, however, of the recent decision, and having regard also to the published report of that case, which does not disclose that the drawer and drawee of the draft were identical, it cannot even in our own courts become a precedent for an interpretation of the Act in a manner contrary to the opinion above. Some of the banks, though with some doubt, were in the habit, however, of following it.

Legislation.—In some of the States Amending Acts have been passed so that banks may have the protection of section 60 (or 61) in respect of this class of document.

Thus in Victoria,

"For the purposes of section 61 of the Principal Act, a banker who carries on the business of banking at more than one place shall be deemed to be a separate and inde-

pendent banker at each of such places." (*Instruments* CHAP. XIV.
Act, 1904, s. 2.)

And in Queensland the following is added as a proviso to section 61:—

Where a bank carries on the business of banking at more places than one within Australasia, any order payable on demand signed by or under the authority of the bank at one of such places within Australasia, and addressed to itself at another of such places within Australasia, shall, for the purposes of this section, be deemed to be a bill payable to order on demand signed by one person and addressed by him to another person. (*Bills of Exchange Amendment Act, 1905, s. 2.*)

In New South Wales, bankers have asked for a similar amendment, which has not, however, as yet been passed.

The Amending Act in England does not touch this point.

Amendments of section 60, it may be pointed out, are designed for relief of the paying, not of the collecting, bank.

Class (8) were not negotiable instruments at all, and judgment was for the plaintiff. Non-negotiable instruments.

CHAPTER XV.

ACCEPTANCES AND PROMISSORY NOTES: THE DUTY AND POSITION OF THE PAYING AND OF THE COLLECTING BANK.

CHAP. XV. Following are the statutory definitions of a bill of
Bill of exchange, an acceptance, and a promissory note:—
exchange.

Bills of Exchange Act, section 3 (1).—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

- (2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

Acceptance. After the drawee of a bill has expressed his assent to the order of the drawer, by writing his signature across the face of the bill, it is termed an acceptance. The conditions of a valid acceptance are referred to later.

Promissory A promissory note is defined by the Act in *section*
note. 83 thus:—

- (1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

- (2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker. CHAP. XV.
- (3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.
- (4) A note which is, or on the face of it purports to be, both made and payable within Australasia is an inland note; any other note is a foreign note.

It has been shown that the relation of banker and customer is one of debtor and creditor, with the super-added duty on the part of the bank to pay the cheques or demand drafts of the customer to the extent of his credit. The existence of this relation does not raise a like duty in respect of bills of exchange accepted, or promissory notes made payable, at the bank; nor need it involve the bank in accepting bills of exchange, not payable on demand, drawn by a customer upon it.

In the case of a bill drawn upon a bank by virtue of a letter of credit, whether requiring acceptance or not, the position of the bank would of course depend on the terms of the credit.

It is, however, a very usual thing—indeed, it has by now become in Australia the general practice—for all acceptors of bills who have banking accounts to accept them payable at their bank, and when promissory notes are given, these are usually domiciled payable at the bank of the promissor. To make a bill in this way, payable at a bank, is to give the bank authority to pay it, but the bank is not, merely by reason of being banker to the acceptor, bound to undertake the obligation of payment. “The relation of banker and customer does not of itself and apart from other circumstances impose upon a banker the duty of paying his customer's acceptances. If autho-

Domiciling
bill with
bank.

CHAP. XV. rity is wanted for this proposition, it will be found in
 1851, 16 Q.B. *Robarts v. Tucker*, where it was said by the Court that
 560. (A. and E.) 'if bankers wish to avoid the responsibility of deciding
Post, p. 206. on the genuineness of indorsements, they may require
 their customers to domicile their bills at their own offices,
 and to honour them by giving a cheque upon the banker.' That
 implies that bankers may refuse to pay their customers' accep-
 tances, and that such refusal is not inconsistent with the relation
 of banker and customer, or a breach of the banker's duty to his
 customer. If a banker undertakes the duty of paying his customer's
 acceptances, the arrangement is the result of some special agree-
 ment, expressed or implied." (Per Lord Macnaghten, *Vagliano*
 1891, A.C. 107. *case*.)

In view of the general practice, there can be no doubt that very slight evidence would be properly received by Judges and juries, as establishing an agreement on the part of the banker to pay his customer's bills domiciled with him; and where a banker has habitually done so, he would be taken to have agreed to continue to do so, as long as the customer's credit remained sufficient and no notice of a contrary intention had been given.

Signature. As in the case of payment of cheques, the banker is supposed to know his customer's signature, and a forgery paid by the bank by mistake could not, in any ordinary circumstances, be charged against the customer, however free from negligence the bank and its officers might be.

Indorsements on accep- With regard to indorsements, the subject is more
 tances, P.Ns., difficult; such statutory protection as the paying banker
 position of bank. has, extends, in the case of section 60, to bills payable
 to order on demand; and, in the case of the crossed cheque
 sections, to crossed cheques alone; and there is no statu-
 tory protection to the banker in respect of acceptances
 or promissory notes. The passage already quoted from
 the *Vagliano case* indicates the law that bankers are un-
 protected in this matter, and, if they undertake the duty

Supra.

of paying their customers' acceptances, the responsibility of deciding on the genuineness of the indorsements on those acceptances is theirs also; if the bank pays an acceptance whereon any indorsement, necessary to discharge the acceptor, is forged or insufficient, the customer by such payment gets no acquittance, and cannot afford to let the bank charge his account with it; on the other hand, no ready means of identification are usually at hand for the bank. The bank is thus often placed in an awkward dilemma. If verification of the indorsements does not appear on the bill when presented, and the indorsements are unknown, the question arises: "Will the bank undertake the responsibility? If the acceptance or promissory note be paid promptly and the indorsements are not in order, the bank will lose; if payment be delayed, as is often done, the customer's credit may be injured; room, too, is opened for other complications. Suppose the banker to return the bill, as is often done, with the answer "indorsement requires verification," without more. This answer is unsound and insufficient; in point of law the indorsements do not require verification. If demanded, verification is required merely by the bank itself to endeavour to lessen the chance of loss, not to get rid of responsibility, let it be noted, for, however often the indorsements are verified, the bank still pays at its own risk, and can only charge the customer with his bills *duly paid*. This answer, therefore, if it means anything, means that verification is insisted upon by the bank as a safeguard for itself. If the customer dislikes having his bills returned in this way, and complains of injury to his credit, there is no use in telling him the bank did it to protect him, for such is not the case; the legal relationship between the acceptor and the bank being, as has been pointed out, such that the bank can only charge bills *duly paid* against him, the acceptor requires no protection of the kind. Of course, the fact

Verification
of indorse-
ments.

CHAP. XV. may be that the customer's credit was not injured; that is a different matter.

If the matter be further analysed, it becomes clear that the course supposed either may injure the customer's credit or may place the bank in a very queer position.

Bills of
Exchange
Act, s. 47.

"A bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained . . ." (i.e., on due date), and it is sufficient that the holder does what is reasonable to obtain payment. Now, suppose the holder presenting such a bill goes away, apparently satisfied with the answer "indorsement requires verification," and the bank, having foreseen no difficulty nor given any more definite answer, is later on attacked by its customer for the alleged dishonour of the bill, could the bank claim that there had been no dishonour, that payment could have been obtained, and the holder had not done what was reasonable to obtain payment? I think such a defence would be most unsafe. Besides, it is in the power of the holder to put the matter beyond doubt. If he choose to press the bank for payment and to explain its answer, it must become quite clear whether he can or cannot obtain payment. If he should drive the bank into giving the assurance "that the bill is quite good, so far as the acceptor is concerned, and will be paid, so soon as assurance that indorsements are in order is obtained," the bank's position is unsafe in another way; for, if thereby the bank should be able to escape the consequence of dishonour, it certainly would fall under the liability of having given an assurance, and the customer might deplete his account before the re-presentation of the bill. It would appear that any answer of the kind I have been dealing with can be ultimately resolved into a refusal to pay or a guarantee to pay, and, as to the latter, the holder cannot be compelled to accept it, nor to refrain from treating the bill as dishonoured. Nevertheless,

there has not, so far as I am aware, been any decision involving a banker in liability for returning acceptances or promissory notes with such an answer, and until such a thing happens it will be a matter of policy for banks to decide whether the risks they run in returning such answers are not worth the advantage gained by getting a number of verifications. Such a matter is, of course, outside the province of law. CHAP. XV.

Another course which the bank sometimes in these cases adopts is to offer to pay the acceptance subject to receiving an indemnity from the holder. This is stated by "Chalmers on Bills of Exchange" to be the usual practice; apparently he refers to cases of suspicion, doubt, or uncertainty as to the holder, for he also puts forward the view that in England possession is *prima facie* evidence of identity.

In bad cases, however, such an indemnity may be worthless; it might be refused altogether. And, besides, the bank has in point of law the right to recover back money paid away in mistake of fact; thus, in the case of bills presented by people of substance, whose indemnity would be useful, the bank has already a legal right. The subject of recovery of money paid away in mistake of fact is discussed in a later chapter. In the case of a bill of exchange, it would appear that the right to recover back money so paid might be lost, if the case were such that recourse was lost by delay against intermediate indorsers, who should have had notice, or an undue interval of time had elapsed since payment. A holder, who had given a sufficient indemnity, would be precluded from setting up the first, perhaps both, of these defences; and this would seem to be the most useful function of such an indemnity.

If the drawer's signature be forged, the bank cannot be made responsible in respect of that; the customer is to know what he has accepted; the document accepted by him is the one which the bank is authorised to pay. Forged signature of drawer.

CHAP. XV.

Forged
indorsement.

Bank may be
liable even
when forged
indorsement
was prior to
acceptance.

Robarts v.
Tucker, 1851,
16 Q.B. 560.
(A. and E.)

Of course, unless the bill has been negotiated before acceptance, it will most likely not be indorsed till afterwards. If the bill has been negotiated before acceptance, as many trade bills are, it will be usually because the bill is drawn in terms of a letter of credit, under which acceptance is practically guaranteed, or is supported by documents for merchandise over which the collecting bank has control; thus the terms of the business and quarter from which presentment is to be expected, will often be known to both banks, and not much room for doubt can arise. If, however, a bill should be indorsed before acceptance, and be then accepted, the indorsement being a forgery, and be paid by the bank at due date, then, for such a case, the acceptor has forced the bank to bear the loss, and it appears this would always be so unless the bank could show circumstances between itself and its customer equivalent to an admission of its genuineness, or inducing the banker to alter his position so as to preclude the customer from showing the indorsement to be forged.*

* *Robarts v. Tucker* was a very important case twice decided against the bank by a numerous bench in the Appellate Court (Exch. Chamber). One bill for £5,000 was involved. In the second trial the whole of the evidence consisted of a long list of mutual admissions. The customer represented a life insurance company, whose practice it was to settle claims by honouring the bill of a local agent drawn upon him in favour of the claimants; and before acceptance the drawee always required the indorsements of the payees. This bill represented such a transaction. The payees' indorsements had been forged. Both insurance company and bank were entirely free from any negligence; but the bank had taken no steps to assure it itself that the indorsements were genuine, though its officers had done all that could be done in the way of scrutiny within the office. Among other things, it was admitted that the practice of the customer to see indorsements on the bills before acceptance had not been communicated by him or by his authority to the bank; and that the bank examined and dealt with the bills accepted by the company in the same manner

In the case of isolated or single transaction bills, CHAP. XV. where the course of a customer's business is not within his banker's knowledge, and especially in the case of bills which have been negotiated after the acceptance, and before being lodged with the collecting bank, the banker's risk is a very real one; and in the case of promissory notes, which constitute, in Australia at any rate, a far larger class, the indorsements are, in the regular course, subsequent to the signature of the promissor.

One way in which customers authorise the bank to pay their acceptances or promissory notes is by advising the bank from time to time of such of their paper as is about to fall due and of which presentation may be expected within the ensuing week, or other period. This express authority is not necessary, however, for merely domiciling the acceptance or promissory note at the bank implies authority. Such letters of advice are falling into disuse, and unless the bank insists there is no reason why a customer should send them. Their tendency is to protect the bank, in that they give a means of check-

in all respects as they examined and dealt with the bills of their other customers.

Held, the bankers' authority in case of a domiciled bill is to pay it to the person who is according to the law merchant capable of giving a good discharge for the bill, and the bankers cannot charge their customer with any other payments than those made in pursuance of that authority.

Seemle, had the bank been informed by the customer that he believed the indorsements genuine, there is room to suppose the decision might have been the other way.

The Court said, "If bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker." The delay that would be caused, practical difficulties, and other causes, have been against the adoption of this suggestion; and the difficulties remain which were discussed, *ante*, pp. 202, 203.

CHAP. XV. ing the paper presented, and operate as admissions by
 1891, A.C. the customer that such bills are his. In the *Vagliano*
 107. case, such a letter was fraudulently caused by a clerk to
 be sent the bank, and formed a step in the achievement
 of a huge swindle, the loss caused by which fell upon
 the customer; but grounds entirely outside the letter were
 enough to put Vagliano out of Court.

Payment of
 overdue bills. When the bank's authority to pay is implied only
 from the domicile of the bill, and the bill is presented

Wine v.
 Bank of
 N.S.W.,
 4 A. J. R. 78. for the first time overdue, it is a nice question whether
 the authority is to be considered as still in force and
 continuing till that bill is satisfied; or whether it should
 be read as limited to the case of presentment on due date
 simply. This question is discussed at length in "Hamil-
 ton on Banking," pp. 137-138. In Victoria it was decided
 that the banker was bound to pay, so that the authority

Practice as
 to. is apparently to be regarded as continuing; but the
 opinion of the profession in New South Wales was at
 the time of that decision to the contrary effect, and that
 the bank in such cases should communicate with its
 customer. If, however, the paying bank can see or be
 satisfied that the acceptance or promissory note was put
 in course of transmission, to be presented at due date
 at its domicile, and the delay has been merely caused by
 some error in transmission, congestion of business, or
 miscarriage of a mail, I think the bill should be paid. If,
 on the other hand, the insufficiency of the customer's
 account on due date or afterwards, undue delay, or any
 circumstances of suspicion attaching to presentment, or
 in the appearance of the bill, raise the notion that the
 bill was not intended to be paid, or that presentation may
 have been delayed by arrangement, then the bank should
 certainly communicate with the acceptor or refuse the
 bill on the ground of its being overdue. This, again,
 is to some extent a matter of policy, for, as I have pointed
 out, the strict right is not finally decided. In an English

case, however, a remark fell from Lord Abinger that, if a bill was presented during banking hours and dishonoured for want of funds, and presented again after business hours, the banker having meanwhile received assets sufficient to meet it, it would be proper for a clerk, who was in the office and aware of these facts, to inform the person presenting the bill a second time that the banker had since received funds for the acceptor, and the bill would be paid on the following day.

CHAP. XV.
Whitaker v.
Bank of Eng-
land, 1 C.M.
& R. 744.

Of course, a bill need not be paid by the bank after banking hours.

If a customer has given the bank authority to pay by domiciling a bill there, or in any way, and the bill is properly presented on due date and paid by the banker, even though in amount it exceeds the customer's credit balance, the mere fact that the customer had not fully provided for the bill is not notice to the banker that his authority to pay has been withdrawn, and the banker could safely dishonour cheques afterwards presented for payment against the exhausted or overdrawn account.

Amount of
bill exceeds
credit
balance.

A customer can usually, by express notice, cancel any authority he may have given to pay his acceptances; but if, acting on such an authority, the bank have committed itself to the holder, so as to be liable to the holder to pay the bill, the authority to pay the holder cannot be revoked.

Cancellation
of authority.

In paying an acceptance, which is to be charged against a customer's account, it is the duty of the bank to carefully see that the document presented is the valid acceptance of the party charged; usually this is the duty of the ledger-keeper. To be valid, an acceptance must be written on the bill and be signed by the drawee, but the mere signature of the drawee without additional words is sufficient. The acceptance must not express that the drawee will perform his promise by any other means than the payment of money. Acceptances are either

Duties in
respect of
payment.

Validity of
acceptance.

- CHAP. XV.** general or qualified; those which are presented for payment at a bank are almost always general, for merely domiciling the bill as payable at a particular place does not qualify it, unless it is expressly stated that it will be paid there and not elsewhere. Holders of bills are not bound to accept qualified acceptances; if any such are taken and have been domiciled at a bank, they will in course of time come to be presented. The qualification, if allowed, amounts to a condition precedent to payment of the bill, and if such a document should be presented for payment, the bank should, in the absence of knowledge of fulfilment of the conditions, refuse or communicate with the customer.
- Qualified acceptances.**
- Acceptance in blank.** Anyone who accepts a blank stamped bill or bill form holds out the person whom he entrusts therewith as having authority to fill it in as he pleases, for any amount within the limits of the stamp.
- Firms and companies.** In the case of bills purporting to be accepted by or of signatures to the promissory notes of companies, firms, and partnerships, the paying bank should be especially careful to see that the correct style of the company, firm, or partnership has been used in the way in which the bank is authorised to pay cheques on the same account; in the case of a company, of course, nothing would be paid against the account except upon the authorised signatures used on behalf of the company in the proper way. If persons sign a bill as agents or directors of a company or any other body, merely by way of description, they are personally liable; if they desire to bind their principal only, and escape personal liability, they must indicate clearly that they are signing in their representative character; in any case the bank will only pay upon the signatures and in the form provided by the authority to operate the account given by the company.
- Non-traders.** In the case of a non-trading firm or partnership, promissory notes or acceptances would not be expected

to be made use of, and a bank should be chary of paying these without express authority, no matter how regular the signature may be. CHAP. XV.

Professional partnerships (*e.g.*, solicitors) and partnerships for mining purposes, for agriculture, and commission agency, and partners carrying on business as auctioneers, have been held non-trading. In America, physicians, tavern-keepers, tunnel-workers, and farmers have been held non-traders. The difficulty arises from a presumption in law that the authority of each partner to bind the firm applies only to matters within the purposes of partnership business.

In the case of an acceptance which, after its delivery as such, is altered fraudulently in amount, the bank paying runs the same risk of loss as in the case of a forged cheque. (See *post*, Chapter XVII.) Raised amount.

Remittances to meet Acceptances or for Special Purposes.—In the ordinary course of business all deposits made by a customer go to the credit of his ordinary account; and if the bank discounts bills for him, the proceeds are credited in current account in the usual way. It is quite competent for the parties, however, to make any other arrangement. If the customer choose, he may remit funds for any special purpose, as, to take up an acceptance or promissory note which he has domiciled at his bank; it will then be for the bank to undertake the duty thus imposed or not; if undertaken, a different and special contract is entered into between the bank and the customer, which must be literally carried out. But the bank is not in the least bound to undertake any unusual obligation; as, in all cases of contract, the position of the bank will be determined by its conduct, and especially its reply to its customer after receipt of his remittance and letter of advice, and the bank cannot modify its customer's instructions except by communication

CHAP. XV. with him. The bank's course, therefore, is to accept, or refuse, or make a different offer.

Practically everything will depend on the customer's letter of advice, or verbal stipulations at the time of deposit.

There are three different kinds of arrangement which might be entered into for such a transaction:

- (1) The letter of advice might merely make a deposit of the ordinary kind, and contain information volunteered by the customer as to the reason for making such a deposit. This is really a case where the customer's instructions fall short of creating the position now to be considered.
- (2) The letter of advice might make it necessary for the bank to hold proceeds of the remittance in a special account until presentment of the bill. But the new and special account would be an ordinary simple contract debt between the bank and its customer. The distinction between (1) and (2) would be very important if cheques of the customer, or bills other than that specially advised, should be presented for payment in advance of the specially-advised acceptance; in case (1) it would be dangerous to refuse payment; in case (2) it would be necessary to protect the special deposit and deal with the ordinary account independently.
- (3) A possible third course would be where the customer should send cash or documents to be retained *in specie* until the date required, and then to be used in settlement of a bill. Here the bank would act, not so much as a banker, but as a custodian or stakeholder. And the difference between this and the first two cases would be considerable; the property in the

Huenerbein
v. Federal
Bank, 13
N.S.W. L. R.
244.

Cf. Hart, pp.
381 *et seq.*

uncollected documents would remain in the customer. If the bank went insolvent, the customer would not be limited to prove in the insolvency for the amount of his remittance, but could properly demand from the trustee in the bankruptcy the return of the actual documents.

In some of the English text-books much space is devoted to distinguishing the rights of parties in transactions of this kind. That is because of the prevalence of bill-broking and of small private banks in England; and the occasional insolvency of private banks and brokers has led to a mass of case law on the subject. In Australia, where the business of bank is entirely in the hands of large public companies, it is quite unnecessary for ordinary students of banking to follow these rights in detail.

Banker and Holder.—If a banker, whether by special remittance or by instructions in respect of the ordinary account of a customer, is authorised to pay any acceptance or other bill and commits himself to this effect to the holder, he cannot afterwards go back from that position and refuse the bill—if the customer have depleted his funds before presentation; the bank has only itself to blame for having relied upon the conduct of its customer and given an assurance to the holder, who is entitled to rely on the bank's conduct; the bank should, if necessary, protect itself by reserving money enough for the bill. Except in cases of this kind the bank of domicile owes no duty to the holder until the moment of presentation.

When the acceptance or promissory note is presented, it is the bank's duty to take due care of the bill,

Lilly v. Hays,
5 A. & E. 548,
and *Noble v.*
National
Discount Co.
(1860), 5
H. & N. 225.
Cf. *Hart*, 399-
402.

CHAP. XV. and, if not paid, return it in good order; but if, before
Cancelled in error answer given, the bill is cancelled preparatory to payment, it may be marked "cancelled in error" and returned with any proper answer. The reason is, that uncommunicated entries within the bank do not bind it one way or the other; the answer given to the presenter, or conduct equivalent to an answer (such as settlement with another bank through the exchanges), is what settles the matter.

Stamp duty. With regard to stamp duty, both banks are interested. The paying bank must not pay a bill not duly stamped, and the presenting bank is bound to see that the bills which it holds, either as its own, by way of discount, or on behalf of its customers for collection, are properly stamped. The duty is 6d. for every £25, and also for any fractional part of £25. In the case of bills drawn or made in N.S.W., impressed (N.S.W.) stamps are necessary. Bills drawn or made out of N.S.W., or so purporting, require to be stamped in this country, although by the law of the country of origin they may have had to be stamped there also; and, until properly stamped according to the law of this country, it is penal to indorse, negotiate, use, transfer, or present them for payment. You will notice it is not prohibited to present them for acceptance. Therefore it is not necessary for a bank acting merely as agent to obtain acceptance, to stamp bills before acceptance; it would be a mistake to do so, for, if not accepted, the bill may be protested for non-acceptance and returned without local stamps. Stamps, however, would be necessary upon any dealing in any such bill, either before or after acceptance or protest for non-acceptance. For foreign bills adhesive stamps are to be used. In the case of demand drafts, whether foreign or otherwise, the duty is one penny, and may be denoted by an adhesive stamp affixed by the maker or holder.

But secus if presentment for acceptance amounts to user of the bill, but cf. *Sharples v. Richard*, 26 L.J., Exch. 302.

Demand drafts.

Duty of Collecting Bank.—If a banker undertakes CHAP. XV. the duty of presenting a draft for acceptance, he may Presentation for accep- be justified by considerations of prudence and the interest tance. of his customer in not pressing for acceptance in such Bank's lia- a way as to lead to a refusal, providing he takes the right bility. steps at the right time to preserve his customer's rights; but if he is dilatory in endeavouring to procure acceptance (or payment) or in giving notice of dishonour, or is otherwise negligent in the matter, and his customer suffers damage in consequence, he will be liable to make it good.

As for the drawee, the bank is under no obligation No duty to to him; and in a case where a draft was supported by drawee. documents in respect of the goods for which it was drawn, and the bank informed the drawee by memorandum that "the bank holds bill of lading and policy for 251 bales of cotton per William Cummings," and the drawee accepted the bill without asking to see the documents, and then retired it before it was due, and the bill of lading proved to be a forgery, it was held that this memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine.

With regard to the question, What are the necessary 1871, L.R. 3, steps to preserve the rights of the holder whose agent P.C. 526. the collecting bank is?—the case of *Bank of Van Diemen's Land v. Bank of Victoria* is an important one, where a decision of the highest Court depended upon the fulfilment of this duty. The facts were these: One Gunn, a merchant of Launceston, drew a bill for £3,000 upon R. Goldsbrough and Co., of Melbourne, at 15 days' sight; this he discounted with the Bank of Van Diemen's Land, who sent it by post in the usual course to their agents, the Bank of Victoria, for acceptance and collection. The Bank of Victoria received the bill at 1 p.m. on a Friday afternoon, and a clerk from the bank presented and left it for acceptance with Goldsbrough and

CHAP. XV. Co. at 2 p.m. same day. Next morning (Saturday) Mr. Parker, a partner in the firm, wrote the firm's acceptance upon it, and handed the bill to his cashier to be delivered to the bank clerk; but when the bank clerk called about 11.30, he was told by Goldsbrough's cashier that the bill was mislaid, and was requested to call again on Monday. This he agreed to do. On Monday morning Parker read in a newspaper that Gunn, the drawer of the bill, had arrived in Melbourne. Fearing that something was wrong, he went to his counting-house at 9 o'clock and told his cashier not to part with the bill until further instructed. The bank clerk called about half-past 11, when some excuse was made about the person who had charge of the bill having gone out. Soon afterwards Parker saw Gunn, and learned that the goods against which the bill was supposed to have been drawn had not been shipped; he thereupon got the bill back from his cashier, and cancelled his acceptance by striking his pen through it. In that state it was finally handed back to the Bank of Victoria, who returned it to the Bank of Van Diemen's Land in the usual course. The Bank of Van Diemen's Land lost, for Gunn became insolvent, and the bank received nothing in respect of the bill. In this state of affairs the Bank of Van Diemen's Land sued the Bank of Victoria, claiming the amount of the bill. It was insisted that the defendant bank might by due care have got the bill back accepted on Saturday. In the Privy Council Lord Cairns said: "Now, the first question which their Lordships have to consider is, What is the meaning of the term 'unreasonable time' as between persons circumstanced as the plaintiffs and the defendants were? The defendants were the agents of the plaintiffs. The law does not lay down as an absolute rule any time which is reasonable or unreasonable as between persons standing in this relation for the execution by the agent of the duty which is imposed upon him. But inasmuch as the

Reasonable
time.

object of the transmission of a bill of this kind from principal to agent is to obtain the acceptance and the payment of the bill, or, if it is not accepted, to guard the rights of the principal against the drawer, in case recourse is to be had to the drawer, their Lordships are of opinion that the duty of the agent must be measured by those considerations, and that the duty of the agent is to obtain acceptance of the bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his principal against the drawer.”

And, further, their Lordships expressed themselves as “prepared to hold that, it being part of the ordinary custom of merchants to leave a bill for acceptance twenty-four hours with the person upon whom it is drawn, and it not being proved that in this case there was any different usage in Melbourne, but, on the contrary, there being strong evidence that the same usage prevailed there which prevails in other places, and the business houses closing at Melbourne at 12 o’clock upon the Saturday, before the twenty-four hours had expired . . . there had been no breach of duty”; and that “it would have been a harsh and unnecessary proceeding to have insisted on a distinct answer on the part of the drawees or a redelivery of the bill at half-past 11 on the Saturday”; and that, even if the clerk made his first call to obtain the acceptance on Monday morning, there would not have been any failure of duty on the part of the Bank of Victoria.

After acceptance has been obtained, the bill will in due course mature, when it must be presented for payment. The collecting bank may hold the bill as owner by reason of having acquired it by discount from a customer, or it may be simply the collecting agent of one of its

CHAP. XV.

24 hours
customary.Presentation
for payment.

CHAP. XV. customers, or of some other bank; in any case it must make due presentation, according to the Bills of Exchange Act; otherwise the drawer and indorsers will be discharged. This rule applies equally to promissory notes as to acceptances. If the bill is domiciled payable at a bank, there can be no difficulty as to the place of presentation. Due presentation involves presentment on due date, and delay is only excused when caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. If a just cause of delay exist and then cease, presentment must be made with reasonable diligence.

Due presentation.

With respect to bills which require presentment for acceptance or payment in another country, the law of that country must be consulted to ascertain what are the due steps.

If due presentment is made and the bill dishonoured, it is necessary for the bank to send out notices of dishonour promptly.

Dishonour notice by banks.

Two forms of dishonour notice are in general use amongst banks in respect of bills: the one applies to bills of which the bank is the holder in its own right, having acquired them by discount; the other is used for bills for collection which the bank has presented or caused to be presented, as collecting agent for one of its customers.

Bills discounted.

In the former case (bills discounted) the bank notifies its own customer, for whom the dishonoured bill was discounted (who in ordinary course is also the last indorser) of the dishonour, with full particulars of the bill for identification, and of the fact that the amount of the bill has been charged back to the customer's account—if such has been the case—or a demand for a cheque to take up the bill, or for some other mode of settlement according to the practice of each bank. Notices, too, are often made out for the earlier indorsers and drawer of the bill, and, if the bank is not sure of the value of

its recourse upon the last indorser, it will be careful to send these notices to the addresses of those on whom recourse is desired. In practice, these are often sent under cover to the customer who discounted the bill—he knows the address of the indorser with whom he dealt can send on the notice or not, as may be necessary—for as a rule the bank is satisfied with its right against its own customer, and can leave him to conduct his own business.

In the case of a bill for collection dishonoured, the form of notice is simpler; the bank does not require to claim against its customer in respect of it, but merely informs its principal of the dishonour, within the same time as if the banker were the holder and the principal the last indorser; and he upon receipt of such notice has himself the same time for giving notice as if the agent—*i.e.*, collecting bank—had been an independent holder. The bank, therefore, does not make out more than one notice, nor does it claim against anyone; but the case would be different if a banker's lien existed over the document.

If the dishonoured bill should be a foreign one, appearing on the face of it to be such, it must be protested for non-payment or non-acceptance, as the case may be, and if it be not so protested, the drawer and indorsers are discharged. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

"*Noting*" is prior to "protest," and refers to the minute made by the notary public on the bill at the time of its dishonour; the minute includes a mark or reference to the notary's register. In order to make his note, the notary, by himself or by a clerk, makes a separate presentment of the bill.

The "*Protest*" is a formal notarial certificate of the fact of dishonour, subsequently written out and based upon the noting.

CHAP. XV.

Act § 94.

When a bill requires to be protested, and the services of a notary cannot be obtained at the place of dishonour, any householder or substantial resident of the place may in the presence of two witnesses give a certificate signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

CHAPTER XVI.

FORGERIES (1).

The subject of forgeries is a very wide one, in the CHAP. XVI.
sense that you may meet with forgeries in almost any
direction and of the greatest variety.

Forgery has been defined in the common law as "the fraudulent making or alteration of a writing to the prejudice of another's right"; in another phrase, "the making of a false document with intent to defraud."

In New South Wales the criminal law is chiefly contained in statutory enactments now consolidated in the Crimes Act, 1900. For the purposes of the Crimes Act *forging* is defined; it means "the counterfeiting or altering in any particular, by whatsoever means effected, with intent to defraud, of an instrument, or document, or of some signature, or other matter or thing, or of any attestation, or signature of a witness, whether by law required or not, to any instrument, document, or matter, the forging of which is punishable under this Act."

It can be readily perceived that this definition, of Uttering.
the Crimes Act, is wide enough to include the shorter one already quoted, viz., "the making of a false document with intent to defraud," which has the merit of being short and easy to remember.

Of course the offence of forgery is complete when the false document is made with criminal intent. But no harm to anyone can result until the forgery is uttered or put off upon some innocent person; and this is not of necessity done by the forger. Therefore the uttering

CHAP. XVI. of a forgery is a separate offence, of the same class as forgery and punishable to an equal extent; and the words *utter* or *uttering* are specially defined. When used in the Crimes Act with reference to a forgery, they mean "that the person uttered, offered, disposed of, or put off the same with intent to defraud, knowing it to be forged."

Protection against the forgery or uttering of bank-notes or bills of exchange is given by the Crimes Act, under which punishment may extend to fourteen years' penal servitude, but in cases where the forgery is only by a wrongful representation of authority, as an indorsement *per pro.*, the limit of punishment is only ten years.

The first thing that occurs to many, when the word *forgery* is used, is the direct forgery of a signature, but really so many other acts amount to forgery that it may be well to give a few illustrations.

Illustrations
of forgery.

Thus, drawing a cheque without authority on behalf of an employer and signing for him *per pro.* by an employee would constitute forgery, if this false pretence of authority on the part of the employee were made with intent to defraud; but if the criminal intent were absent, it would not be forgery, though none the less ineffective to bind the pretended drawer.

Putting an address to the name of the drawee of a bill of exchange while the bill is in course of completion, with the intention of making the acceptance appear to be that of a different person will be forgery. Similarly, to fill in a blank cheque already signed with a proper signature would be a forgery if done by a party having no authority and with dishonest intention; so, to fraudulently increase the amount of a regular cheque and make it appear to be a cheque for a different amount is forgery. And where a bill of exchange, payable to AB, came to the hands of another AB, who fraudulently indorsed it,

that was forgery. So it was, where a prisoner had written certain names across the back of cheques drawn by himself in favour of self, or bearer. Also, where one S. signed a draft in the name of H. Turner, jun., of Noah's Row, Hampton Court, there being no such place or person. CHAP. XVI.

In all these instances, of course, the presence of a criminal intention is necessary, or the crime of forgery has not been committed.

It is worth while to see where lawyers have drawn the line between forgery and false pretences.

It is considered by the writers of text-books that if A should personate B and draw a cheque in his assumed name (whether of a fictitious or an existing person) upon a bank with which he had in his assumed name opened a genuine account by the actual payment of money to his credit, that would not be a false document and that if, when such an account were depleted, A, by issuing a further and valueless cheque on the same account, obtained any credit or goods, that would be false pretences simply. That is to say, if A knew the cheque would not be paid, the fraud would make him guilty of false pretences; but the document could not be termed a false document, and thus the offence could not amount to forgery. Forgery and false pretences.

A New South Wales case is reported in some of our local books, where it was held that the filling in a date on a cheque reconstructed from torn pieces of the original cheque, which pieces the owner (who was the drawer, and who had never issued the cheque, but torn it up to destroy it) had abandoned, was not forgery, and that to obtain money dishonestly by such a cheque was false pretences merely. I should have thought it was forgery or uttering, as the case might be. I should have thought, if the drawer, not having dated the cheque nor issued it, tore it up in that incomplete state to destroy it, that it Reconstructing a torn cheque.

CHAP. XVI. was not a cheque; and therefore, if anyone with fraudulent intent pasted it together and made it appear to be the drawer's cheque, it would be a false document and a forgery, and that if anyone, knowing the taint in the document and for dishonest purposes, added a date to give it a greater similitude of reality, that too would be a forgery. There is no authorised report of the case, which is an old one. The digested account is based upon a newspaper report, and would probably not be considered as having much authority. Of course, you will remember from the Bills of Exchange Act that the absence of a date does not invalidate a cheque, and the holder has authority to fill it in.

Forgery a nullity.

Now, a forgery is for most purposes in law a nullity, and can have no effect in rendering liable parties who, by the deceit that has been practised, are made to appear to be involved in the false document. Thus, if a bank pays a cheque purporting to be that of a customer, but in fact a forgery, the customer cannot be debited with the amount. This is one of the simplest and best-known risks to which a bank is exposed.

Other invalid documents.

The difficulties of a bank as to documents in the nature of forgeries are not limited to those in respect of which the crime of forgery has been committed; for there may be a great many documents which are shams and inoperative to affect the rights of parties and yet not technically forgeries, by reason that they were made without any intent to defraud. Illustrations of this are most likely to be found where one person purports to be signing on behalf of another, but has no authority to do so, as in the first of the examples of forgery already quoted. Such documents are as ineffective to alter the rights of a party charged by the document as a complete forgery would be; for they are simple shams, and it is a first principle of law that in a transaction which is to have effect as a voluntary transfer of goods or credit, or

acceptance of an obligation, the mind and will of the party to be bound must accompany the formation of liability; of course, consent by delegated authority is the same as actual personal assent. CHAP. XVI.

There are, naturally, many cases where it is a matter of great difficulty to ascertain the presence or extent of delegated authority, and there are cases where a sham or forgery has been issued, and the circumstances of its issue or the conduct and dealings of parties subsequent to its issue are such that the law will allow the subsequent adoption or ratification of the document by the pretended drawer, or even by reason of his conduct stop him from denying the authority or full effect of the document; in such cases, if the document has been paid by the bank, the drawer, or acceptor, as the case may be, can be charged with the amount. Next chapter will deal with this branch of the subject. Adoption or ratification, estoppel.

To return to the general principle that a man can only sign away his rights with a willing or intending mind. This is well recognised and provided for in express terms in the Bills of Exchange Act, which provides, in section 24, that "where a signature on a bill is forged or placed thereon without the authority of the person who signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or give a discharge therefor, or enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority." Act, s. 24.

But nothing in the section is to affect the ratification of an unauthorised signature not amounting to forgery. And the 25th section provides that "a signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound Act, s. 25.
Cf *post*, p. 260.

CHAP XVI. by such signature if the agent in so signing was acting within the actual limits of his authority."

By other provisions of the Act banks, paying or collecting cheques, are in certain cases protected in the event of forged indorsements or crossings, viz., 60, 80, 82; these have been dealt with in the preceding chapters.

The main dangers to which the paying banker is left exposed are the following:—

Cf. *post*, pp.
227, 232.

(1) Forgery of his customer's signature as drawer of cheques, acceptor of bills, or maker of promissory notes;

Cf. *post*, p.
244.

(2) Fraudulent alteration of the amount of cheques presented for payment;

Cf. *ante*, p.
206.

(3) Forged indorsement in bills accepted payable at the bank;

(*cf.* Paget, p. 143) these are the risks arising out of the bank's contractual relationship with its customers. There is also

(4) Danger of paying a forgery of the bank's own paper, such as notes, drafts, and bank cheques.

With regard to the loss caused by paying a forged note of his own bank by a bank's officer, it may be interesting to explain his position with the bank.

Under the ordinary contract of employment, a bank has, as employer, no universal right to make one of its clerks bear the loss occasioned by payment of a forged note. If the note were taken in the ordinary course of business, and in spite of the exercise of due care and diligence, the loss should fall on the bank. If, on the other hand, the loss were due to negligence on the part of an officer, he would be liable to indemnify the bank. But in any case the contract of employment might be so framed as to make the clerk liable at all hazards for a forgery taken, and the contract may be varied from time to time, especially on the appointment to new work or a higher

position; and a known rule of the bank or a special instruction to one being promoted to the position of teller, which was acquiesced in, would of course have this effect. I think that in such cases banks are habitually quite fair with their officers. And, at all events, though the law is as I have stated, the wisdom of disputing a small point with one's employer is a different matter.

Similar considerations would apply to the case of a ledger-keeper paying a cheque on which the signature of a customer was forged.

With regard to the person to whom the forgery has been paid—*cf.* mistake of fact, *infra*.

With regard to the risks springing from forgery of a customer's signature as acceptor or maker of domiciled bills or promissory notes, these may be minimised by securing from the customer at intervals, lists of his acceptances and promissory notes falling due and payable at the bank. The practice is, however, dying out.

Assuming now that a bank has paid a straight-out forgery as for a customer, about which there is no doubt that the customer cannot be debited, the question arises as to what are the bank's remedies.

Forgery of
customer's
signature.

Of course, if payment was obtained by the forger or utterer, or anyone deriving through them in bad faith, the money can be recovered from the party to whom it was paid, though such a person is usually hard to find or not worth attacking.

If the forgery has been paid to an innocent holder, who presents it in good faith, believing it to be the real obligation of the customer indicated (the bank paying in the same belief) there is a mutual mistake of fact between the innocent holder and the bank, and the general rule of law in such cases is that the money paid away in mistake may be recovered from the party paid.

Money paid
in mutual
mistake of
fact.

CHAP. XVI.

Doctrine
applied to
negotiable
instruments.

In the case of negotiable instruments, however, difficulties are added to the situation when the instrument has been negotiated, and there are more than one indorser, for these have rights among themselves, and this will be so even in the case of a sham or forgery, if innocent indorsers have among themselves dealt with the forgery on the footing of its being an honest bill; therefore quick discovery of the mistake, and notification in time to preserve the rights of indorsers, is of importance.

This law may be illustrated by summarising two of the most important cases.

1896, 1 Q. B. 7.

In the *London and River Plate Bank v. Bank of Liverpool*, the plaintiff bank had issued from its branch at Monte Video to the purchaser, one H. Garcia, a merchant there, a draft for £261 0s. 11d. on its London office at 120 days' sight, payable to the order of Fueyo, with whom H. Garcia desired to settle an account. The draft was drawn in a set of three. H. Garcia posted the first of exchange to Fueyo, Havannah; by next mail he wrote again and posted the second of exchange. Neither of these letters ever reached Fueyo. But a person calling himself Pedro Garcia called upon Loychate and Co. (apparently bankers and merchants in Havannah) and presented this draft (both the first and second exchange) and asked to have it discounted. It then bore indorsements by Fueyo to H. Garcia and by H. Garcia to Don Pedro Garcia. Both these indorsements were subsequently discovered to be forgeries.

Loychate and Co. would not discount the bill before they learned of its acceptance. They got the so-called Don Pedro Garcia to indorse it "Pay to the order of Messrs. Larrinaga and Co. value in account with Loychate and Co.—date—Pedro Garcia." The draft then went forward in their ordinary correspondence to Larrinaga and Co., Liverpool, who secured acceptance by the London and River Plate Bank, and advised Loychate, who paid

Don Pedro, who, having got the cash, disappeared and CHAP. XVI. could no longer be found.

In due course the bill matured. Prior to due date, Larrinaga and Co. had credited Loychate with the bill, subject to payment, and so advised them, and had also paid the bill into their own account at the Bank of Liverpool, received credit and drawn against it.

On the due date the acceptance was presented to the London and River Plate Bank by Glyn, Mills, Currie and Co., as agents for the Bank of Liverpool. It was paid, and credit for it transmitted by Glyn, Mills, Currie and Co. to the Bank of Liverpool.

Some months afterwards the forgery was discovered, and the third of exchange paid by the plaintiff bank to the true owner.

The London and River Plate Bank had then paid their draft twice over; the first payment being upon a mistake of fact as to the genuineness of the indorsements. This action was therefore brought against Glyn, Mills, Currie and Co. and the Bank of Liverpool and Larringa and Co. to recover the first payment.

All previous cases were reviewed, and the bank was ^{1829, 9 B. & C.} held unable to recover. In the course of his judgment, ^{902.} Matthew, J., said: "In *Cocks v. Masterman*, the simple rule was laid down in clear language for the first time that when a bill becomes due and is presented for payment, the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back, but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back.

"That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill

CHAP. XVI. cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonour to the other parties to the bill; but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day. Now, that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present; and, as it seems to me, is unimpeachable."

Bank collect-
ing a forgery.

The case is also useful to illustrate the position of the bank collecting proceeds of a forgery; for instance, Glyn, Mills, Currie and Co. were mere agents for collection, and the case against them was abandoned, no doubt because the plaintiffs saw it would be futile; and as between the Bank of Liverpool and Larrinaga and Co. the judgment made it clear that the liability to repay (had any existed) would depend upon whether the Bank of Liverpool had received payment as agents for collection simply, in which case they would be entitled to be discharged from the suit, or as holders for value, as had actually been the case. Thus, had the liability existed, the Bank of Liverpool was properly sued. This case was decided in 1895.

1903, A.C. 49.

More recently still, and by higher authority, there was decided in the case of the *Imperial Bank of Canada v. the Bank of Hamilton* (Privy Council).

The Imperial Bank, who appealed, were the defendants in the suit and the Bank of Hamilton were plaintiffs.

The forgery was of a marked cheque. [The practice of marking cheques to show them to be good has gone out of use in Sydney, where a bank in such a transaction always now retains the cheque presented and issues its own instead.]

CHAP. XVI.
Forgery of
marked
cheque.
[Practice in
Sydney.]

The Bank of Hamilton had marked as good a cheque for \$5, drawn by one Bauer, a customer; he fraudulently raised it to \$500, deposited it with the Imperial Bank, who placed it to his credit; he forthwith drew cheques upon the account so opened, and they were honoured in the usual course of business.

The cheque was paid by the Bank of Hamilton to the Imperial Bank through the Clearing-house on January 27th, a.m.; next day Bauer's account was turned up and the fraud discovered. The delay of a day in verifying payment of a marked cheque was proved to be usual in those parts.

The effect of marking a cheque in this way was explained in a previous case thus: "A cheque certified before delivery is subject as regards its subsequent negotiation to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn."

As soon as the mistake had been discovered, the Bank of Hamilton gave notice to the Imperial Bank, offered to pay the cheque as for \$5, and claimed the difference, viz., \$495. The Bank of Hamilton brought this action to enforce that claim, and were held entitled to receive the money; against that decision the Imperial Bank appealed, but were beaten on the appeal. The following extract shows the nature of the judgment of the Privy Council:—

"The cheque for the larger amount was a simple

CHAP. XVI. forgery, and Bauer, the drawer and forger, was not entitled to any notice of its dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has, therefore, no application. The rule laid down in *Cocks v. Masterman*, and recently reasserted in *Vide supra*, even wider language by Matthew, J., in *London and River Plate Bank v. Bank of Liverpool*, has reference to negotiable instruments, on the dishonour of which notice has to be given to someone, namely, to some drawer or indorser, who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their Lordships are not prepared to extend it to other cases, where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay in giving it."

It will be seen that this decision is not in perfect harmony with the previous one in the case of the River Plate Bank, and to the extent of the doubt raised as to the too great stringency of the rule, in that case, the law must be regarded as doubtful.

Money paid
on a forged
cheque.

It is a little curious that these cases dealing with forged drafts and marked cheques should have required decision, and yet no case have arisen on the far more usual instrument, viz., an ordinary cheque. In the event of such a cheque proving to be a forgery, and having been paid to the innocent victim of the forgery or his agent—there being no intermediate indorsers—it would seem on principle the paying bank would be entitled to recover the money. The Bank of Hamilton case seems practically to decide so much, and before that decision this was the opinion of good banking lawyers—that is, assuming the banker's negligence, other conduct, or delay did not disentitle him to relief.

There was a further and very interesting point in CHAP. XVI. the Bank of Hamilton case. It was claimed that the Bank of Hamilton was guilty of negligence, for which it should be held liable, in marking and allowing to go out of its office a cheque with such a blank in it as to be capable of easy alteration, and although this part of the case was not developed, it opens up a very interesting point, which will come naturally into next chapter. Negligence of bank marking the cheque.

CHAPTER XVII.

FORGERIES (2)—ADOPTION OR RATIFICATION (*MARSHALL v. COLONIAL BANK*)— ESTOPPEL.

CHAP XVII. It has already been laid down as a first principle of law that a person only signs away his property with a willing or intending mind, and that the giving of a bill or cheque, or incurring any kind of liability upon such an instrument, is subject to the same rule.

Supra. An instance of this rule was given in last chapter in the case of the *Imperial Bank of Canada v. the Bank of Hamilton*. There, a bank had marked a cheque good for \$5, and it was subsequently taken out of the bank and increased to \$500, so that it appeared to be a marked cheque for that amount, and was dealt with by another bank as such, and yet it could only be enforced against the bank which marked it as a \$5 cheque.

1 C.L.R. 243. Another striking instance of this same proposition in law was the recent case of *McLaughlin v. the "Daily Telegraph" Newspaper Co.* McLaughlin had, while insane, given his wife a power of attorney to deal with his property, and she alienated it, but when he regained his sanity he proved that the power was given while his mind could not accompany the transaction. It followed that, upon this being satisfactorily shown, the power fell to the ground, and any disposition or giving or selling of his property depending upon that power fell with it. The Court ordered the property in question to be restored. But, being a Court of Equity, restoration

was only ordered subject to McLaughlin allowing credit CHAP. XVII. to the other side for the moneys realised of which he had actually received the benefit.

In the last chapter we considered the case of a bank being landed with an invalid instrument, which it has innocently paid, and the possibility of recovering the money from the party who received it.

Generally, if this is not possible, the bank must be the loser. But it was pointed out there are cases in which the drawer or other person liable may have so conducted himself as to be treated in law as having ratified or adopted the instrument in question as a valid obligation of his own.

The simplest illustration of this would be a case Unauthorised signature. where a clerk, having no authority to draw cheques on his master's account, but having a certain amount of discretion and confidence reposed in him by his master, in the absence of the latter concludes some transaction, and gives a cheque purporting to be signed on account of his master by himself as agent. In the ordinary case, the master is not bound by this cheque, and the bank cannot pay it at the master's expense; so far as the account of the employer is concerned, the cheque is waste paper.

But should the master discover what had been done, Express ratification. and decide to confirm the action of his clerk, his proper course would be to write to the bank and specially sanction the payment of that cheque; that would be an express ratification. Ratification may, of course, be either express or implied from the conduct of the apparent drawer. To illustrate an implied ratification, we will Implied ratification. take a simple case. Let us suppose that in the case of the master and his clerk, the transaction, for which the master's liability is in question, consisted in the purchase of material used in the master's business; that upon his return the master sees this material, which has

CHAP. XVII. been recently brought upon his premises, and which he knows is always bought for cheque on delivery; without asking any questions he allows the material to be used; also he has had access to his cheque book, and has seen, from his clerk's note in the butt of the book, that in his absence this cheque was drawn. Under these circumstances, he has adopted the contract for purchase of the material made by his clerk, and must pay for it; probably also his conduct, coupled with subsequent silence, amounts to a ratification of his clerk's assumption of authority in drawing the cheque. It would be competent for a jury to find so; and in this case he must not only pay for the goods, but can be made to do so in the particular way of honouring that cheque. The bank, knowing nothing of this, would still have no authority to pay the cheque but, supposing it to have paid, and afterwards to be attacked by its customer for charging the cheque against him without authority, then the bank could, upon proving the facts which amounted to adoption, successfully defend itself, and it would not be fatal that the ratification of the clerk's signature had been made to the payee of the cheque only; for the bank which paid the cheque, or any holder in due course, subsequent to the payee, would be entitled to the benefit of the ratification.

Ratification
of cheque to
payee.

Position of
bank.

It should be noticed that, in point of law, the relief to the bank would not depend *directly* on the ratification, for as between the bank and the drawer the bank would be in a position different to any ordinary holder for value, inasmuch as, whatever clerk of the bank took or paid the cheque, the knowledge of the bank as to the proper signature for drawing upon that account would be imputed to it; therefore the bank would be a holder for value (*bona fide*, no doubt), but with notice of the defect in the cheque. But the position of the bank would be saved by the ratification *indirectly*, for, once given,

the ratification enures, not for the payee only, but for the benefit of the subsequent holders to whom the cheque may be negotiated. Any of these could enforce the cheque against the drawer. If, then, he attempted to escape liability to the bank on the ground that its knowledge of the defect in signature invalidated payment, the bank could reply by claiming an equal amount of money as paid for the use of the drawer, and to avoid circuity of action.

The implied ratification of a signature, and a bank's justification for paying upon it, may depend, however, upon conduct which is directly within the notice of the bank. For instance, in the case described, we will suppose the bank to know that a great degree of confidence was placed in that clerk by that master, and to have paid without question the first cheque of the kind presented, and that afterwards the master had his pass-book, and checked it, and made no demur, and then another cheque drawn in the same way was presented through the same channel. Under these circumstances, if the bank paid this cheque, it might fairly claim to be justified in assuming that the master by his previous conduct had in the first instance ratified the clerk's assumption of authority, and that implied authority for future similar transactions had been given.

In the language of a very great Judge, used in a case when a man had paid a bill improperly accepted in his name, and was thereafter sought to be charged with other and similar bills, "*One who pays one bill which purports to bear his signature as acceptor thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and if the bill is given in a course of business implying a continuance of such authority, it may be conclusive evidence.*" If, instead of the words italicised above, you read *one who knowingly allows a cheque which purports to be his to be charged*

CHAP. XVII.

Ratification
to bank.Per Willes, J.
Morris v.
Bethell, L.R.
5 C.P. 47.

CHAP. XVII. *against his bank account*, and complete the sentence as before, you will have a statement of law applicable to customer's current accounts.

In the case, the jury found, and was held competent so to find, that by the adoption of the one forgery the seeming acceptor was not precluded from denying others of the same kind, on the principle that "one swallow does not make a summer," and there being no regular course of business in question, but a variety of separate business transactions.

Ratification implied from conduct is, of course, the ratification of some thing already transacted, and repeated ratifications, or perhaps the ratification of a single act done as in the ordinary course of business, are matters of conduct upon which implied authority for the future may be founded.

Effect of
acquiescence
in pass book
quære.

The question as to how far a customer's acceptance of his pass-book and revision of it without demur constitutes a ratification of payments charged against him, and shown therein, is fully discussed in Sir John Paget's book in the chapter on pass-books. It seems that a customer will not be allowed, as a rule, to re-open an account that he has not, after having the opportunity, demurred to; but that the English decisions on the point are not in complete harmony with each other, nor very helpful to the bank; and that the American decisions give the banker greater protection, and are besides more in accord with modern tendency.

Questions of adoption or ratification, and of implied authority, depend always upon the particular facts of each case. The cases present such varying facts that we cannot lay down general principles by which at once to distinguish a set of facts which amount to adoption from a set of facts which do not.

Relationship
of parties.

In determining any such question, the principal points to be considered are, Whether he whose signature

has been forged, or used without authority, has lain by CHAP. XVII. after knowledge of the forgery and allowed someone, to whom he owed a duty, to lose by it, or to be placed under a risk by it? or, Was not the loss caused simply by dealing in the forgery, and independently of the subsequent conduct of him whose signature was forged? or, Did any benefit by reason of the forgery accrue to him who denies the instrument? or, Did he who denies the instrument deal with it in such a way as to mislead the transferee into the belief that the document issued was his? &c. You will see that the object of any such questions or tests as I have described is simply to get a point of view of the facts which will bring out clearly the relationship of the parties, and what each person concerned actually did and intended with regard to the document in question.

I will now endeavour to illustrate the subject by reviewing some of the more important decisions.

McKenzie v. British Linen Co. was a case decided (1881) by the House of Lords. The British Linen Co., a Scotch 6 App. Cas. 82. bank, had been imposed upon by a forger, for whom they had discounted a bill; this bill, which was a forgery, purported to be drawn by McKenzie and another on the forger, accepted by him, and indorsed by the drawers; it was for £76; both the signatures of McKenzie and those of McDonald (the other drawer and indorser) were forged, and neither of them had had any previous dealing with the bank. The bill became due on the 10th April, and was not paid. On the 12th April, which was a Saturday, the bank posted dishonour notices to both the drawers. McKenzie received the notice the same evening, but did not go to the bank.

On the following Monday morning the forger called at the bank with a bill, blank as to amount, purporting to be drawn, accepted, and indorsed in every way like the unpaid forgery, and asked for a renewal. The bank refused this, but on payment of £6

CHAP. XVII. agreed to renew for £70. The bill was then filled in for that amount; it purported to be due in three months, upon the 17th July. It was simply a fresh forgery.

Three days before due date the bank sent a notice to McKenzie: "Your bill on John Fraser (*i.e.*, the forger) for £70 is due on the 17th July, and lies at the office for payment." McKenzie received this, but did not come to the bank. On the 17th July the bill was dishonoured, and the bank again wrote, and demanded that the drawer should order the bill to be retired at once. The bank received no answer, and wrote again on the 21st. On the 25th the matter was placed in the hands of the bank's law agent, and he on that day wrote again to McKenzie and the other drawer. Four days later (29th) McKenzie's solicitor called in reply, and refused on his client's behalf to pay the bill on the ground of the signatures being forgeries.

There had been no change in the position of the bank between the 14th and 29th of July.

As between McKenzie and the forger the story was somewhat as follows:—McKenzie was a simple and illiterate man, though not unacquainted with bill transactions—and in the report of the case before the House of Lords prominence is slyly given to this fact, as though the reporter in private had his own Scotch doubts. McKenzie and Fraser (the forger) had had no previous transactions, but soon after the discounting of the first bill McKenzie received a letter from Fraser asking him to call, as "he had some particular thing to tell him," to which at first he paid no attention, but on receiving notice from the bank with regard to the first bill, he thought the John Fraser referred to must be the same, and called on him before going to the bank on the same Monday on which the renewal had been effected.

Fraser then admitted to McKenzie that he had forged his name, but also solemnly assured him that he had paid

the bill by cash. The old forgery was handed over to CHAP. XVII. McKenzie, who took it away. The matter being apparently all settled, McKenzie did not go on to the bank. Of course, upon these facts he was unaware that any further bill purporting to be his was afloat, or that the bank had any interest in any such document. *Before they parted he got a letter from Fraser, post-dated the next day, to the effect that before that date he had not signed a bill in Fraser's favour. He then had a dram with Fraser, who also lent him £3 or £4 for a few days (which was repaid).*

The bank's business throughout was transacted by its agent at Inverness.

The evidence was very conflicting, Fraser's story being in complete contradiction of McKenzie's; the story of the other drawer went to substantiate McKenzie, and the Court of first instance found in his favour; and as a result of the criminal proceedings Fraser was found guilty of forgery. Upon the first appeal the bank won; but, upon carrying the appeal to the House of Lords, McKenzie won, and the judgment of the Court which tried the case was restored.

The bank's claims were:—(1) That the bill had been drawn and indorsed by McKenzie or with his knowledge and authority; (2) that McKenzie had adopted the bills, and could not be allowed to plead forgery. As to the first of these claims, it was admitted that the signatures were not written by McKenzie; and therefore the bank had the burden of proving they were placed there with his knowledge or authority; but there was a lack of credible evidence on that point, so that the claim could not be sustained. It is clear the case is as near the line as possible, and had the suspicious circumstances, italicised above, been incapable of explanation on the ground of McKenzie's simplicity, so that the Court which heard the witnesses had refused credence to him and believed

CHAP. XVII. the story of Fraser, the bank would have won; such, however, was not the case. As to the claim that McKenzie had adopted the bill, and should be estopped from denying it, it was to be considered that the bank had in the first instance dealt with Fraser alone, and that afterwards when the renewal was taken the agent again dealt with Fraser alone and committed himself to discount the renewal without waiting for news from McKenzie, and that though McKenzie had lain by from July 14 to 29 without communicating with the bank, no further loss or change in the bank's position had been caused thereby. The following passage sufficiently shows the ground of the judgment:—"It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so the bank was in no worse position than it was at the time when it was first within his power to give the information.

p. 109.

Silence
insufficient to
imply
adoption.

p. 110.

"I do not think that the Scotch cases which have been cited at the bar bear out the proposition that silence in circumstances such as occur in the present case is *per se* sufficient to imply adoption of a forged bill."

1896, A.C.
257.

In the more recent case of *Ogilvie v. West Australian Mortgage and Agency Corporation*, a question was decided by the Privy Council with regard to the conduct and silence of a customer against whose account the bank had charged cheques, which had been forged by a clerk of the bank, to the extent of £1,462 8s. Ogilvie, the customer, a squatter, had come into Perth in May, 1891, and obtained from one Edmund Canning, a son of the manager, and an accredited agent of the bank, his pass-

book made up to date, and then discovered these unwarranted items charged against him; he communicated this fact to young Canning, who told him the cheques had been forged by Armstrong, and exhibited to him a confession of guilt written by Armstrong, dated May 6, 1891. Ogilvie then said that Canning, jun., "ought to make the matter known to his directors and have the man prosecuted." Canning asked Ogilvie not to make the matter public, saying that if he did so "the corporation would lose all chance of getting the money back," that "the man would be arrested and they would lose the money." Also that "it would nearly kill his old father if I told the Directors." Upon this Ogilvie said nothing about the matter to anyone, and the forger was permitted by Canning, jun., to get away to England.

Later, when Ogilvie demanded a rectification of his account, the bank resisted it, and claimed that Ogilvie was estopped from denying that the signatures to the forged cheques were genuine, and that he had ratified what the forger had done, and, of course, to back up this defence, the bank (which, according to the Privy Council, was really Canning, sen.) denied that it had ratified the action of Canning, jun., in permitting the forger to go to England, and tried to throw the responsibility for this upon Ogilvie. But the jury found that Edmund Canning was the accredited agent of the bank, and had knowledge of the forgeries before Ogilvie, and that it was at Edmund Canning's request that Ogilvie kept silent with regard to the forgeries for six weeks in order that the forger might go to England and send the amount of the forged cheques to the bank, also that Ogilvie had acted honestly, and solely for the benefit of the bank. It was held there was no estoppel to prevent Ogilvie obtaining a rectification of his account; and that under the circumstances the silence of the customer was not a legal wrong to the bank. The Privy Council thought, however, that if Canning's request to Ogilvie had been

CHAP. XVII. made in such a way or under such circumstances as ought to create in the mind of a person of ordinary intelligence a suspicion or belief that the agent or ordinary managers of the bank's affairs meant to betray its interest, it would then have been the duty of Ogilvie to lay the whole matter before the directors.

There may be a duty to speak out.

Ratification of a forgery illegal.

Although one may adopt or ratify a debit to one's account depending upon a forgery, or be estopped from disputing the charge, it is, I should point out, impossible to ratify the crime of forgery, after it has been accomplished, in such a sense as to exonerate the forger from the operation of the criminal law. And where a transaction turned out to be a written ratification of a forgery on the one part, given in return for a promise not to proceed criminally against the forger on the other; and where the holder of the bill had been, apart from the writing in question, in nowise misled or prejudiced by the party whose signature had been forged: it was held there was no estoppel and the ratification was void, as founded on an illegal agreement.

Brook v. Hook, L. R. 6, Ex. Cas. 89.

Estoppel and adoption.

As to the terms "estoppel" and "adoption," it is, as Sir John Paget says, not easy to define where, apart from adoption, estoppel as to the absolute forgery of the customer's signature comes in. But in the case of cheques which have been drawn upon a bank and then fraudulently increased in amount and paid by the bank for the larger amount, there are some passages in some decisions of authority, and in text-books, to the effect that the customer may, if he has been negligent in drawing the cheque, be estopped from disputing liability for the higher amount.

Estoppel by negligence.

The scope of this doctrine and its application are as 1 C.L.R. 632, yet uncertain, and it is upon this hitherto unascertained 22 T.L.R. 746 "corner of the law" that the decision in the case of (1906), 4 C.L.R. 196. *Marshall v. Colonial Bank* depends. But some of the

uncertainty has been cleared away by that decision, and CHAP. XVII.
in some States of the Commonwealth by Acts of Parliament lately passed.

This case is the most important one in pure banking law which has been decided since the establishment of the High Court of Australia. It was made the subject of an appeal to the Privy Council, and it is well worth the while of any student of banking law to understand it.

The action was brought in the Supreme Court of Victoria by Marshall and Day against the Colonial Bank and Myers. Marshall, Day, and Myers were co-executors, and had an account in the Colonial Bank, against which the bank was only to pay cheques signed by all three executors. It was the custom that Myers should fill in the cheques and forward them to the other executors for their signatures, after which they were returned to and signed by him and issued.

Myers on different occasions drew open cheques for £10, £2 6s. 4d., £50, £10, and £10 respectively. He wrote the amounts in words and figures so as to leave considerable spaces before these amounts. He began each number with a capital letter. The cheques were forwarded as usual, signed as drawn, and returned to Myers, who then wrote in other words and figures, so that the cheques appeared to be for £110, £32 6s. 4d., £150, £110, and £110 respectively. Myers then cashed the cheques and fraudulently appropriated the excess amounts to his own use.

Subsequently Marshall and Day discovered the fraud, and claimed from the bank the balance which would have been at credit if only the true amount of each cheque had been debited. This the bank refused. They then brought an action claiming £430.

The bank's defence was that the cheques were drawn without reasonable care and precaution and in a manner and form so negligent that the plaintiffs enabled and permitted the alterations and increases to be made, and

CHAP. XVII. the bank paid such cheques so altered in good faith and without negligence; the bank contended that, therefore, the plaintiffs were estopped from alleging that the cheques so altered and increased were not their cheques or drawn by them or with their authority, and from alleging that the said cheques were, in fact, fraudulently altered and increased in amount.

The bank's case, therefore, was that the customer was to be estopped upon the ground of negligence from proving the cheques to be forgeries. And the Chief Justice in Victoria instructed the jury there was a duty on the part of the customer to take care in drawing his cheques not to expose the banker to risks of loss in this way (or not to *unreasonably* expose); in effect, that there was a duty upon the customer not to draw cheques in such a way as to facilitate fraud. And the jury thereupon found the customer negligent, and judgment was entered for the bank.

Upon this the plaintiffs appealed to the Full Court in Victoria, who dismissed the appeal, and thereby indorsed the charge to the jury. The plaintiffs thereupon appealed to the High Court, who allowed the appeal, and caused judgment to be entered for the plaintiffs.

Before explaining the judgment of the High Court it will be as well to see what had been decided in previous cases.

1827, 4 Bing
253, *supra*.

The case of *Young v. Grote*, decided many years ago, is the case most like *Marshall v. Colonial Bank*. A man about to leave home signed and left five blank cheques with his wife, desiring her to have them filled up for such sums as the purposes of his business might require. His wife got a clerk to fill in one of these cheques for £50 2s. 3d., and then asked him to get it cashed; he then fraudulently turned the cheque into one for £350 2s. 3d. After the matter had been submitted to an arbitrator, the Court finally held the customer must bear the loss.

In the High Court it was very truly pointed out that this CHAP. XVII. case of *Young v. Grote* was originally decided by four Judges, who gave as many different reasons for their decision; that it had often been cited and commented on; seldom, if ever, followed; that many different explanations of it had been given; and that in 1896 the Lord Chancellor of England formally invited the House of Lords to overrule it.

That case has certainly got into all the banking text-books, and there was a very general feeling among bankers that it was settled law.

In cases not between banker and customer the decisions have been quite the other way. Thus in *Scholfield v. Lord Londesborough*, which was a decision of the House of Lords, it was held that the acceptor of a bill of exchange was under no duty to take precautions against fraudulent alterations in the bill after acceptance. Fraudulent alteration of acceptance. That was a case where a bill for £500 was presented for acceptance with a stamp of much larger amount than was necessary and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who afterwards fraudulently filled up the spaces and turned it into a bill for £3,500. In that case the authority of *Young v. Grote* was much relied upon, but was of no use Supra. to the unfortunate holder for value of the bill, who had purchased it for the full amount.

And in the case of *Imperial Bank of Canada v. Bank of Hamilton*, which you will remember from last chapter as the case where a bank had marked as good a cheque for \$5 in which there were spaces, and it was subsequently increased to \$500, the point was raised that the loss should be borne by the bank marking the cheque, by reason of its negligence in adding its authority to a document so open to easy alteration, but it was barely argued, as the Court considered the point settled by *Scholfield v. Lordesborough*. Raising of marked cheque. Supra. In this case the parties were in no contractual

CHAP. XVII. relationship in respect of the document when the imposture was practised.

Implied duty
of customer.

The question that the High Court had to determine was whether the instruction given to the jury by the Chief Justice of Victoria was correct. In order that negligence such as would render the plaintiffs liable, or bind them by estoppel, could fairly be found against them, it was essential that there should be some corresponding duty to take care, which had been neglected. Now, as between Marshall and the bank there was the contractual tie of banker and customer, but there was no express stipulation that Marshall would take such a care, and none of the cases which lay down the effect of the ordinary banking contract have ever decided that there is such an *implied duty* upon the customer as not to draw his cheques in such a way as to facilitate or leave open the door to fraud (unless *Young v. Grote* were such a decision); and on the other hand, in the case of custody of goods and delivery orders upon a warehouseman, such a duty had been expressly negated. The High Court, therefore, determined, and this is the central point of the case, and the one I would enforce upon the attention of students, that there is no such implied duty to guard against fraud on the part of a bank's customers when drawing cheques.

22 T.L.R.
746, 4 C.L.R.
196.

From the High Court the case went to the Privy Council, where the decision was upheld. The Privy Council, however, was somewhat more guarded than the High Court in the expression of its decision. It apparently recognised that there might be a duty on the part of the drawer of a cheque towards his banker, which did not exist on the part of the acceptor of a bill towards the holder, but held that "Whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger could utilise them for the purpose of forgery, is not by itself any violation of that obligation."

And the following judicial dicta, which had been CHAP. XVII. approved in *Scholfield v. Earl of Londesborough*, were Supra. again quoted with approval, viz. :—

“That it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it”; and

“That people are not supposed to commit forgery, and the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.”

Final authority has therefore made it clear that in such a case there is no estoppel against the drawer by reason of negligence in the manner of drawing. Many bankers have regarded the decision as dangerous and unfair to their companies; and in Queensland an Act has been passed to obviate the effect of the decision. The enactment is by way of amendment of the Bills of Exchange Act, and among other matters the following proviso is added to section 61 of the Act:—

Where a bank in good faith and without negligence 60 N.S.W. and Eng. pays a bill or note drawn on or made payable at the bank, and the bill or note has been so drawn, accepted, or made by a customer as to afford facility for any fraudulent alteration in the amount thereof, and the bill or note has been so fraudulently altered, the bank shall not be responsible or incur any liability by reason of having paid the bill or note. [*Bills of Exchange Amendment Act (Q.)*, 1905, section 2.]

It should be noticed that the Amending Act refers only to alteration of the amount, and the reasoning and principles of *Marshall v. Colonial Bank* would still apply in case of another alteration.

Although *Marshall v. Colonial Bank* is a decision Another view of Marshall v. Colonial Bk. that the bank may not rely on estoppel by reason of negligence in the drawing, and thus charge its customer with

CHAP. XVII. raised cheques carelessly drawn, in respect of which it has not itself been negligent; that case does not decide that other conduct of the drawer may not provide an estoppel. Yet the facts of that very case would seem to have invited such a defence, which the bank could have used at any rate as a second string. For the cheques were altered *before issue*, and afterwards issued by one of the drawers apparently in an ordinary course under cover of his usual authority, and persons taking the cheques would not, with ordinary care, and did not in fact, obtain notice of any defect or excess of authority on the part of the drawer entrusted with the issue. It may be observed that this view of the case would appear to bring it into line with *Young v. Grote*, which has not been directly overruled (or, at any rate, into line with one of the decisions and some of the explanations of *Young v. Grote*), and would also serve to distinguish it from *Scholfield v. Londesborough*, where the alteration was made *after issue* of a complete acceptance.

A remark of Sir John Paget's has already been quoted, to the effect that, apart from adoption or ratification, it is difficult to see where estoppel can come in. It is physically impossible, however, for a man to issue a cheque at the same time by his wife or servant and by himself (*Young v. Grote*), or by his partner or co-trustee and himself (*Marshall v. Colonial Bank*); and, seeing the document could never pass into circulation, or be presented at the bank, but for the delegated act of the servant or co-trustee in issuing or presenting, the question arises whether the drawer should not be bound by the act of issue, or presentation for payment, by his agent.

Estoppel on
the issue.

One would suppose that the bank's advisers must have considered this line of defence, and abandoned it; or else that, the case having taken a certain shape, it was fought in the higher Courts by the bank as a pure matter of policy to obtain a decision on the question of estoppel

by negligence in respect of the drawing, as a useful principle; whereas a decision on the conduct of Marshall and his fellow-trustees as to issue or delivery would, it may have been supposed, be less advantageous in principle. CHAP. VXII.

It should be borne in mind that *issue* is a step of vital importance in the life and validity of negotiable instruments.

“Issue” means the first delivery of a bill or note, Issue defined. complete in form, to a person who takes it as holder. It is considered that this definition applies equally to cheques as to bills. The definition does not, perhaps, embrace the exchange of cheques for cash at the paying bank by or on behalf of the drawer without ever being put into circulation.

By section 21 of the Bills of Exchange Act, “Every Act, s. 21. contract on a bill, whether it be the drawer’s, the acceptor’s, or an indorser’s, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.” There are certain qualifying provisos which need not be considered here. Bill here includes cheque, and delivery includes first delivery or issue. It will be readily seen how important is the act of first delivery or issue. Now, in *Young v. Grote* and *Marshall v. Colonial Bank*, *Ante.* the forgery occurred before issue in both cases, and the uttering of the forgery may be described as coincident with the intended and authorised issue or first delivery of the document, or, more strictly, as substituted for the authorised issue, and in each case the conduct of the drawer authorising issue *by his amanuensis* was such that parties to whom the forgeries were uttered could not have distinguished them from sound cheques. (See some remarks of Mr. Justice Kennedy’s at the end of this chapter.) The writer therefore thinks that banks, and all parties taking any such cheques, might reasonably be held protected by law.

The Queensland and ~~Victorian~~ amendments seem too extensive, and likely to press very hardly on the public

CHAP. XVII. by reason of their application to honest cheques converted to forgeries after issue (for the bank is in a better position than its customer to insure against forgery); and at the same time narrow in being limited to alterations of the amount.

Estoppel
against denial
of issue.

1897, A.C. 90.

That there can be an estoppel depending on conduct, and preventing the drawer of a cheque from denying its issue is certain from the case of *Clutton v. Attenborough*. This was a case where a clerk in the employ of the Messrs. Clutton, by an elaborate system of fraud and forgery, represented to them that certain accounts were owing to one George Brett for work done and for material provided, and by this means caused cheques to be drawn and be signed for the firm to pay the supposed accounts. The cheques then came, for postage, into the department where the swindler worked; he got possession of them, himself indorsed them in the name of George Brett, and took them to Attenborough and Sons, who gave him cash or value in good faith; the cheques were afterwards paid in due course by the bank. There was no such person as George Brett, and no such work done or materials provided as appeared to be vouched for in the forged accounts. The Messrs. Clutton attempted to recover back their money from Attenborough and Sons, and among other points their counsel claimed that the cheques had never been issued by them; that it was just as if the cheques had been stolen from a safe or unlocked drawer; but it was held by the House of Lords that the cheques had been issued. Lord Halsbury regarded the drawer of the cheques as having put them into circulation, and Lord Shand took a similar view. Kay, L.J., whose judgment in the Court of Appeal was upheld and approved by the Lords, had said:—"The drawer signed them intending them to be cheques, and handed them over to a clerk intending them to be issued as cheques. To allow the plaintiffs after that to say, as against an innocent

holder for value, that they were never issued appears to CHAP. XVII.
me to be impossible."

In this case it was also decided that George Brett ^[Fictitious payee.] was a fictitious or non-existing payee within the meaning of the Bills of Exchange Act; and the cheques could therefore be treated as payable to bearer.

In a very recent English case, the bank, Barclay and ^{1906, 22} Company, Limited, were sued, to recover the amount of ^{T L.R. 737.} forged cheques debited to a customer's account, in the same kind of action as in *Marshall v. Colonial Bank*, and set up as a defence an estoppel founded on negligence. The customer was a limited company, and had three directors, including the chairman. The chairman knew that his son had four years before forged his signature to a document, but since then the son had apparently lived a blameless life. The chairman and a co-director appointed the son to be secretary of the company, and the directors allowed the secretary to have the custody of the company's cheque-book and pass-book, and did not require to have the cheque-book produced for inspection at their meetings.

The signatures of a director and of the secretary were necessary when drawing cheques on behalf of the company. The secretary forged the signature of a director to a number of cheques purporting to be drawn on behalf of the company, and obtained payment thereof. ^{Facts insufficient for estoppel.} The company claimed to recover from the bankers the amounts so paid. It was held that the company were not estopped by negligence from reclaiming these sums; and the bank had to restore the amount.

The learned Judge who decided that case thought that the relation of banker and customer did involve a duty on the part of the customer, and that an estoppel might be founded on the breach of such a duty; he assumed the existence of a duty to be careful not to facilitate any fraud, which, when it has been perpetrated, is

CHAP. XVII. seen to have in fact flowed in natural and uninterrupted sequence from the negligent act. But, in order to relieve the banker from the consequence of paying money upon a forged cheque, it would not be enough for the banker to show that the conduct of his customer, wilful, or careless, or wasteful, or combining all these elements, enabled the fraud to be committed. He must show that the customer *caused* him to pay the money on the forged cheque. . . . He thought that, for the defence to succeed, it should be shown that the conduct of the Directors in or immediately connected with the *forging* or *uttering* of the cheques misled the defendant bank into making the payments upon those cheques, and that the fraud perpetrated flowed as a natural and ordinary result from the plaintiff's conduct; but the facts did not warrant either inference. *Lewes Sanitary Steam Laundry, Ltd., v. Barclay and Co., Ltd.*, XXII. T.L.R., p. 737, decision of Kennedy, J.; curiously enough, this decision was delivered just one day before the decision of the Privy Council in *Marshall v. Colonial Bank*.

Semble
estoppel may
be founded on
conduct connected (a)
with the
forging, (b)
with the
uttering.

1906.

CHAPTER XVIII.

INDORSEMENTS.

An indorsement is a signature written, usually, across the back of a bill or cheque; there may be writing or printing above the signature, but the signature is essential and sufficient. CHAP. XVIII.
Indorsement.

Where the indorsement consists simply in the signature of the payee (or previous indorsee), the indorsement is *in blank*, and the bill becomes payable to bearer. The same effect would be reached by an indorsement to a named person or bearer.

Where an indorsement specifies a person to whom, or to whose order, the bill is to be payable, the indorsement is *special*.

Where the indorsement prohibits the further negotiation of the bill, or expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, the indorsement is *restrictive*. Restrictive.

Examples of restrictive indorsement:—

Pay D only,

(Signature.)

Pay D for the account of X,

(Signature.)

Pay D, or order for collection,

(Signature.)

Where the drawer of a bill or any indorser desires, he may insert an express stipulation negating or limiting his own liability to the holder. Such an indorsement Without recourse. Act, § 16.

CHAP. XVIII. is known as an indorsement *sans recours*. It is made thus:—

(*Signature.*)

Sans recours.

or, (*Signature.*)

Without recourse.

Conditional. *Conditional Indorsement.*—Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not. The condition, however, operates between the parties to it.

Definition. For the purposes of the Bills of Exchange Act, the term indorsement has a technical meaning and a precise legal effect; it means “an indorsement completed by delivery,” and delivery means “transfer of possession, actual or constructive, from one person to another.”

Negotiation by. Where a negotiable instrument is in such form as to require indorsement before negotiation, and indorsement in the sense of the Act is made, such indorsement operates as a negotiation, except where otherwise provided by the Bills of Exchange Act—*e.g.*, a restrictive indorsement for the purpose of collection only.

Place for. An indorsement on the face of a bill is valid; and where there is no room on a bill for further indorsements, a slip of paper called an “allonge” may be attached thereto. It becomes part of the bill, and indorsements may be written thereon. In the case of bills issued in certain foreign countries, or negotiated there, an indorsement on a copy of the bill may be valid.

In Australia no indorsement should be attempted except on the back of the bill, or on an allonge if really necessary.

In representative capacity. Where a person is under obligation to indorse a bill in a representative capacity, he may indorse it in such terms as to negative personal liability.

Order. Where there are more than one indorsements on a

bill, they are taken to have been made in the order in which they appear, unless the contrary be proved. CHAP.
XVIII.

Where a bill is payable to order, and the payee or indorsee is wrongly designated, or his name misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature. By the banks, use is made of this provision thus: If a cheque for payment to Thomas J. Jones be given to him made out payable to Tom J. Jones or order, it is collected and paid upon the indorsement, Misspelling.

Tom J. Jones.

Thomas J. Jones.

If a cheque is made payable to Mrs. John Brown, the correct indorsement would be,

Mary Brown.

Wife of John Brown.

But if indorsed and presented

Mrs. John Brown,

Mary Brown,

it would be paid.

As to the responsibilities of the paying and the collecting banker in respect of indorsements, reference should be made to the chapters on those subjects.

By the Bills of Exchange Act, section 55 (2), the indorser of a bill by indorsing it— Liability of
indorsers.

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

Provided that where two or more persons indorse as co-sureties, nothing in this subsection shall disentitle any one or more of them to contribution from the other or others, but the rights and liabilities *inter se* of such in-

CHAP.
XVIII.

dorsers shall be subject to the contract in pursuance of which they became indorsers;

- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

Quasi-
indorsement.

And by section 56, where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Under this provision of the Act, strangers who are not parties to a bill may by backing it become liable to subsequent holders for value, and this provision is often availed of to give strength and currency to the bill. Persons who sign for this purpose are termed, sometimes, quasi-indorsers, and their signatures are quasi-indorsements. It should be carefully noted that such signatures are not indorsements in a strict sense; for an indorsement properly so called must be made by the holder

Chalmers,
p. 193.

This section is sometimes of great importance in the case of accommodation bills, and in cases where an indorsement is given by way of security, for in order to fix a quasi-indorser with liability under section 56, it must be shown that the plaintiff is a holder in due course. Now, a holder in due course must be one who has taken a bill complete and regular on the face of it; and if, as is sometimes done, the indorsement for security is placed on the bill or promissory note before it is a complete and regular bill, the first holder has necessarily notice of this, and cannot avail himself, by relying simply on the bill, of the intended security.

Thus a bill is drawn payable to drawer's order and accepted. C afterwards backs it with his signature; it is not at that time indorsed by the drawer. C would be liable to subsequent parties as an indorser, for his quasi-indorsement renders him so under the section above, which follows a decision of the House of Lords in *Steele v. McKinlay*; but he is not liable on the bill to the drawer, who, in the nature of things, knew when he took the bill, this was not an ordinary indorsement operating to create liability under the Law Merchant, but simply an extraneous signature, and therefore the drawer must prove a guarantee in writing to satisfy the Statute of Frauds.

CHAP.
XVIII.

1880, 5 App.
Cas. 754.

But if the drawer first indorsed the bill, and then C indorsed to the drawer, the drawer in such a case, in his subsequent capacity as indorsee, could make C liable as indorser. *Steele v. McKinlay* was decided before the Bills of Exchange Act; but it has been held since that the statute did not alter the law in this respect, and therefore on similar facts a similar decision was given.

Wilkinson v.
Unwin,
7 Q.B.D. 636.

Jenkins v.
Coomber,
1898, 2 Q.B.
168.

The reasoning which applies to an acceptance applies equally to a promissory note, and if a stranger to a P.N. should back it, by writing his name upon it before the payee has indorsed, he would be liable as indorser to subsequent holders under section 56, but could not be made liable on the bill to the payee. *A fortiori* would this hold if the bill were backed while it was still a blank form.

This law was recently applied in Sydney in the District Court in the case of a P.N.

S.M.H., 8
Dec., 1906.

Sometimes what appears to be an indorsement is really in the nature of a receipt; thus, where the indorsee or payee of a bill, instead of negotiating it or indorsing it to his own bank for collection, presents it in person, it is customary for the bank to demand an indorsement which is really by way of receipt.

Apparent
indorsement.

This happens constantly in the case of order cheques

CHAP.
XVIII.

presented personally by the payee. Upon this point Sir John Paget says: "If a man presents a cheque payable to 'AB or order,' unindorsed, the legal presumption is that he is AB. The bank must pay or refuse payment. They may tender a stamped receipt for signature, but cannot otherwise demand any receipt—certainly not one in any particular form.

"The common practice of paying bankers to refuse payment unless the ostensible payee signs on the back of the cheque seems therefore without justification. It is understood that at least one object of demanding such signature is to get the protection of section 60, should the person presenting the cheque not be the real payee."

He thinks it doubtful whether such protection would be obtained.

Per pro.
indorsement.

A widespread impression prevails among bankers and business men that there is a distinction in effect between indorsements in the following forms, viz.:—

John Brown,
per W.T.,
and John Brown,
per proc. W.T.,
or Per procuration,
John Brown,
W.T., Agent.

And especially that the use of the words per proc. amount to an assertion of the possession of some written procuration or authority to sign. But this is not so. Either form purports to be the indorsement of John Brown by an authorised agent; and a banker paying a cheque or bill payable to order on demand on any such indorsement would be entitled to the protection of section 60, should any question of regularity of the indorsement be raised.

Charles v.
Blackwell.
1877, 2
C.P.D. 151.

Unauthorised or forged indorsements are, generally speaking, inoperative; this is recognised in the Act by

section 24, set out, *ante*, p. 225. Section 60 is an exception to the general rule; inasmuch as under it a bank obtains an acquittance in certain circumstances when paying demand documents whereon the indorsement is forged, or unauthorised.

CHAPTER XIX.

BRANCH BANKS AND AGENTS.

CHAP. XIX.

It has already been pointed out that practically all Australian banks are corporations. All the banks doing business in Sydney are corporations ; being incorporated either under the Companies Act or under special charters or statutes. The effect of incorporation is that the bank has an ideal existence as a person in law. You work for a bank which, in some respects an imaginary thing, is yet in law treated as a person or individual. This person for whom you work is not the office, in which your work is done, and where the public come and do business. Your employer is the bank, or company, at the back of that office *and of all its other offices*. And the fact is not different whether you work in the head office, or in the chief branch for a State, or in one of the minor branches. Behind all the network of branches is the bank itself, which is one person in point of law, and may be regarded as an individual carrying on business at so many different addresses.

Unity of
head office
and branches.

Nevertheless, for some purposes in law the different branches of a bank can be regarded as distinct banks.

Branches
regarded as
distinct for
purposes of
dishonour
notices.

12 M. & W.
51

Thus in the case of *Clode v. Bayley*, which was decided sixty years ago, branches were regarded as distinct under the following circumstances. The Portmadoc branch of a bank in Wales discounted a bill and sent it to the Pwllhili branch; the Pwllhili branch indorsed the bill over to the London office, where the bill was sent and

eventually dishonoured; London office returned the bill to Pwllhili, who returned it to Portmadoc, who sent notice of dishonour to the party who had discounted and indorsed to it, who sent notice to the prior indorsers; afterwards, in an action against one of the indorsers, it was claimed that the bank had not sent due notice of dishonour so as to render the indorsers liable on the note; but it was held that, for the purpose of giving notice of dishonour, each of the offices of the bank which handled the note must be regarded as a separate indorser (though in fact no indorsement had been made as between Portmadoc and Pwllhili), and, computing notice in this way, it was found all the notices were in time, and the indorser liable. CHAP. XIX.

The decision proceeded upon the grounds of business necessity, and the lack of knowledge of a London office as to where a bill, received through a chain of branches or agents, should ultimately be returned. The case establishes a very useful exception upon the principle, which depends upon incorporation, and which is laid down in the leading case of *Prince v. Oriental Bank*, to which I proceed to refer. Reason for the exception.

The case of *Prince v. Oriental Bank* is one which though decided in England, originated in New South Wales, finally reaching the Privy Council. It is not surprising to find the most important case on this subject arising upon Australian business. The system of branch banks which pervades Australia is more like the Canadian than any other system, and appears to be derived from the Scotch rather than from English banking practice. English banking was formerly carried on by private banks and partnerships in very restricted areas, who did their business with neighbouring towns and counties by means of agents and correspondents. Now that joint stock companies are displacing private banks, the system General rule.
Prince v. Oriental Bank
1878, 3 A.C. 325.

CHAP. XIX. of numerous branches is becoming established in England.

In the leading case the facts were somewhat complicated, and it is not necessary to detail them fully. Prince was a merchant in Sydney, who held a promissory note to himself, made by a customer of the Oriental Bank, domiciled at their Murrumburrah branch. When it was near due date, he sent this bill for collection through the Bank of New South Wales, by whom it was sent through the Oriental Bank in Sydney. Upon due date Murrumburrah made entries as though to pay the bill at the expense of another branch (Young), where drawer really banked, and cancelled the bill and sent a transfer draft to Sydney in favour of the Bank of New South Wales. There was no further evidence in the case to show whether the maker had provided for the note. Two days later Murrumburrah returned the note to Sydney dishonoured, and asked the Sydney office to cancel the transfer in favour of the Bank of New South Wales. This was done and the note returned, *that bank not having yet received notification of payment*. The Bank of New South Wales gave Prince a proper notice of dishonour. The note when returned to the Bank of New South Wales bore the marks, "Paid 3/4/75," and also a pencilled memorandum "Cancelled in error."

It was already settled law that entries made inside a bank's office, and not communicated to parties beyond, did not bind the bank, and might be corrected before communication.

The question, therefore, was whether this rule should extend to two separate branches or whether payment by Murrumburrah to Sydney office did not amount to a receipt by the bank in Sydney of the money for Prince, or his agents, the Bank of New South Wales. The case thus really turned upon the position or status of these branch banks, and it was held that in principle and in

fact they are agencies of one principal banking corporation or firm, and the few decisions which had already been given with respect to them were consistent with such a view; those other cases I will refer to shortly. CHAP. XIX.

They are *Clode v. Bayley*, *Woodland v. Fear*, and *Garnett v. McKewan*. The first, *Clode v. Bayley*, I have already given the details of; it was examined in *Prince v. Oriental Bank*, and shown to be an exception, dealing only with notice of dishonour, and depending on the necessary steps in the ordinary course of business. Cases examined.

Woodland v. Fear was a case which might seem to support the independence of different branches; for it is the case which decides that a joint stock bank is bound to pay the cheques of a customer at that branch only at which his account is kept. Upon examination, however, it is seen that this case is not one which involves the independence of branches. Its effect is rather to explain the contract between banker and customer as a contract to honour the customer's cheques upon it and made payable and presented at a particular one of its places of business, or addresses, as they have been called. 1857, 26 L.J.Q.B. 202. Honouring of cheques.

Garnett v. McKewan, on the other hand, was a case where the plaintiff had accounts at two branches of the London and County Bank. His account at branch A was in funds; his account at branch B was overdrawn. He drew a cheque upon his account at branch A, where he had funds, and the bank refused to pay it because his account at the other branch was overdrawn, and the Court held the bank was justified in so doing. The principle of that decision, therefore, affirms the identity of the bank and its several branches; though separate agencies, these branches were still agencies of one principal bank, with which alone the plaintiff had contracted; and the simple effect of *Prince v. Oriental Bank* is that so high a Court as the Privy Council has adopted and confirmed that principle. 1872, L.R. 8 Ex. 10. Set-off. Ante.

CHAP. XIX.

It is clear that this is the sound view. If a bank close a branch, for instance—and I do not think the legality of this has ever been questioned—it can still collect through some other agency the debts owing to it, and the balances which it owes on current account are still payable, though, if they are to be drawn by cheque, it must be a matter of arrangement as to which office will honour the cheques.

1903, A.C.
240.

The principle, however, leads to some curious results. In the case of *Gordon v. Capital and Counties Bank*, for instance, it has been laid down by the House of Lords that drafts by one branch of a bank upon another are not bills of exchange at all or drafts in the ordinary sense, for they are not drawn by one person on another, but by one person on itself.

But cf. *ante*,
p. 197.

Another, and it may be a highly inconvenient, effect of the doctrine is, that notice to a bank is notice to all its branches (allowing time for the course of post). Yet this rule was acted upon in *Willis v. Bank of England*, where the bank at head office, having notice of an insolvency, was held liable for the payment of £1,000 on bank post bills to the insolvent, by its Gloucester branch, which was in complete ignorance of the insolvency. This rule, it is obvious, might sometimes work very harshly against an honest company, and it has recently been referred to as unreasonable by an English Judge.

Doctrine of
notice.
1835, 4 A.
& E. 21.

Cf. *Morris v. National Bk.*,
13 N.S.W.
L.R. 93.

Another effect of the unity of the various branches of a bank is that correspondence between officers in the ordinary course of business is *prima facie* privileged.

City Bank v. A.J.S. Bank,
9 S.C.R. 259,
and cf. *Fielding v. Corry*.
infra.

It has been decided that if a bill is made payable at a branch bank it must actually be presented there in order to render the indorser liable upon it, upon dishonour. If, for instance, the head office held the note, it would not be sufficient to telegraph to the branch manager to ascertain whether there were funds to meet it. This decision seems more in accord with

Due presen-
tation.

Clode v. Bayley than the general principle, though it may be explained in the same way as *Woodland v. Fear*. CHAP. XIX.
Ante.

There is under the Bills of Exchange Act a branch of the law which may be productive of further decisions upon the unity of a bank with its branches. It is with respect to crossed cheques and the risk to which bankers are exposed who pay otherwise than in accordance with the crossing. Effect of
general rule
in case of
crossed
cheque.

By section 79, where the banker, on whom a cheque which is crossed generally is drawn, pays it otherwise than to a banker, he is liable to the true owner for any loss he may sustain owing to the cheque having been so paid. Now, since branch banks are identical as to legal personality with other offices of the same bank, a curious position arises. Cheques, we will suppose, which are crossed, are, in the course of conversion to his own use, paid in by a swindler, and are drawn upon the bank itself at other branches, and perhaps a few at the same office, and are paid, and thereby the true owner is a loser. It may then be claimed the bank has not paid these cheques to a banker; he has paid them to the party to whom he gave credit—in the case I am supposing, a swindler—how, then, can the bank have any protection? Is it not in the words of the section liable to the true owner?

Precisely this point arose in the case of *Gordon v. Capital and Counties Bank* in respect of one of the classes of cheques involved in that case. 1902, 1 K.B.
242.
Ante, pp. 194,
195.

And in the course of a highly ingenious judgment, Collins, M.R., said: "Either the case is outside the legislation as to crossed cheques, which does not apply to a case where the circumstances do not admit of two banks being involved in the transaction, and so defendants are within section 60, or, if the case is within section 79, the payment by one branch of the bank to the other satisfies the requirements of that section."

CHAP. XIX.

This judgment is therefore some authority that in fulfilling the duties of a banker under the crossed cheques section of the Bills of Exchange Act, different branches of the same bank can be regarded as separate banks, and even that the same office may be regarded in two capacities, viz., as paying banker and as collecting banker.

The judgment was approved of in the House of Lords, though in general terms only. It is a little curious that a case which insists upon the identity of a bank with its branches in respect of bank drafts should in the case of customers' cheques go towards establishing a distinction.

This important case is more fully discussed in chapter XIV.

Use of other
banks as
agents.

Let us turn now to a discussion of the position of banks who use (in places where they have no branches) other banks to do their collecting for them. On this head the general rule of law is that he who does something by an agent is as responsible as for his own act—that for legal purposes the employing party makes the act of the sub-agent his own, as it were.

Thus, if a bank has no branch of its own at the place where a bill is payable, it nevertheless remains liable to its customer in respect of the due collection of a bill payable at such a place, and of which it may have undertaken collection. And the customer cannot be called upon to suffer any loss that may be occasioned by the conduct of his bank's agents, between whom and himself no privity of contract exists.

1843, 9 Cl.
& F. 818.

The case of *Mackersy v. Ramsays* is one which dealt with this point. In that case Mackersy possessed two Indian bills, which he handed to Ramsays, his bankers, in Edinburgh, for collection. Ramsays sent the bills to Coutts, in London, and Coutts sent them, one each, to two different agents in India. Each agent received pay-

ment of the bill sent him, but both agents failed, and failed to remit proceeds to Coutts. Ramsays, therefore, did not receive the money, and did not credit Mackersy. Mackersy sued Ramsays for the proceeds of the bills, and was successful, for the reasons in law already indicated.

It was held that Mackersy had taken the right step, and would have had no claim to sue Coutts, who were responsible to Ramsays alone. The same point was discussed, and might, under slightly altered circumstances, have required decision in *Prince v. Oriental Bank*; for it was argued that the Oriental Bank, if liable at all, could be sued only by the Bank of New South Wales, with whom it had dealt; and that, whether it was right or wrong, Prince at any rate had no right to sue the defendant bank; and the decision in *Mackersy v. Ramsays* was approved; though the case was decided upon the wider ground that the Oriental Bank had not incurred obligation to anyone. In virtue of agency, therefore, a bank may be in certain cases as liable for another branch bank as for one of its own branches.

CHAP. XIX.

Lack of privity of contract between customer and the agent bank.
Ante.

A recent case of some importance which illustrates our subject is *Fielding v. Corry*. 1898, 1 Q.B. 268.

The Cardiff branch of the Gloucester Bank received a bill for collection, to which there were several indorsers, and forwarded the bill, for collection, to the London and Westminster Bank in London, by whom it was presented. The bill was dishonoured, and within the requisite time the London and Westminster Bank sent by post a notice of dishonour to the Cirencester branch of the Gloucester Bank. Next day the mistake was discovered; it was beyond the time, however, for sending a proper notice to the Gloucester Bank at Cardiff, but a telegram was sent, and, acting upon it, Cardiff sent, within time, notice to its customer, and subsequently correct notices,

CHAP. XIX. within time, were received by the prior indorsers. One of these indorsers, having discovered the flaw in the original notice from London, sought to take advantage of it to repudiate liability.

Correction by telegram of mistake within the bank.

This action was brought to enforce liability, and its success depended solely upon the validity of dishonour notice sent from London. Held, in the Court of Appeal, by a majority of two Judges to one, that good notice had been sent from London to Cardiff, and the liability of the indorsers was preserved. The grounds upon which this decision was given appear to be: That Cardiff and Cirencester branches were both parts of the same principal bank; that notice to Cirencester was therefore notice to the bank, though at the wrong address; that such notice was within time; that the address of a dishonour notice was not a material part of it; and that the correction by telegram was effective to remedy such mistake as had been made, being within such a time as to injure no one, since Cardiff had been enabled to send a proper notice.

With this cf. *City Bank v. A.J.S. Bank, ante.*

Ante.

The dissenting Judge, in a very careful and technical judgment, pointed out that since *Clode v. Bayley* different branches had been held as separate indorsers for the purpose of dishonour notices, and that such a course of business was the only reasonable one, and had existed for a long time, and consisted with the requirements of the Bills of Exchange Act in the case of notices of dishonour. He held the notice was bad.

Limits of the decision.

The reasoning of the decision depends on a personal identity between the Cardiff and Cirencester branches, and would not apply in the case of offices connected simply by agency.

CHAPTER XX.

THE AGENCY OF OFFICERS OF A BANK.

In another chapter the case of *Bremner v. the Union Bank* is referred to by way of illustrating a point arising in connection with stock mortgages, and due to the zealous efforts of a branch manager to save his bank from loss. That case, however, is directly in point as a decision in agency law. It proceeded upon the ground that it could not be assumed that certain acts being done by the manager (seizure of sheep, &c.) on behalf of the bank were as a matter of course (express evidence on the point not having been given) within the manager's authority, for that was to be gathered from his ordinary and not his unusual duties.

CHAP. XX.
Post Chap.
XXII. 17
N.S.W.L.R.
74.

Now, pretty well every officer in a bank has some duties to perform such as bring him into relation with the public or with some other banks or institutions; and one can never foretell whether the legal effect of any one of his acts may not become a matter of importance or even controversy.

Questions which involve such matters will usually arise in one of two ways. (1) A customer of the bank may be aggrieved by some act or fault, of a clerk or manager in the bank's service, which makes a breach of the contractual duties owed him by the bank, or which can be described as unwarrantable negligence in the fulfilment of the bank's duty, and which causes a loss to the customer, giving him a right of action against the bank: an action described by lawyers as arising "*ex contractu*."

Actions
against
banks.
Breaches of
contract
caused by
faults of staff.

CHAP. XX.

Wrongs to
strangers
caused by
staff.

(2) Any member of the public, customer or stranger, may have a wrong done him by a bank, or by an employee of the bank in the course of his employment, independent of any contract, thus acquiring against the bank a right of action upon the wrong or trespass committed. This is classified by lawyers as an action arising from the wrong, or action "*ex delicto*." All the ordinary actions that are brought at common law fall into one or other of these two great classes: actions upon contracts: actions of tort.

Contracts
made by
officers.

Now, with regard to contracts by agents, and the right of enforcing them against the principal on whose behalf they are made, the general rule is that "every act done by an agent on behalf of the principal within the scope of his apparent authority and in the course of his employment binds the principal, unless his agent is in fact unauthorised to do the particular act and the person dealing with him has notice that he is exceeding his authority." Thus, when the proper officer of a bank receives a bill for collection from a customer, a contract is made between the bank and the customer, and the bank becomes bound to use all due diligence in and about the collection of that bill.

In the same way the bank becomes a party to a contract of bailment every time its proper officer receives valuables for safe custody, and the bank becomes bound to use the diligence expected in law of a gratuitous bailee, or of a bailee for hire, as the case may be.

Again, every time a proper officer allows an account to be opened a contract is made, between the party opening the account and the bank, that in consideration of the customer lending his money the bank will properly carry out its duties to that person arising out of the legal relationship of banker and customer.

The bank's employees may, therefore, in the proper course of their work, make contracts which bind it, and

which, if broken or neglected, commit it to certain legal consequences, one of which is an action at law. CHAP. XX.

I have felt it advisable to point this out at some length, for the reason that text-books in their chapter on contracts, and lectures to bankers, are very apt to mention that the contracts of a corporation require to be under the seal of the corporation, without saying more. That rule, of course, applies to the case of nearly all banks, for nearly all are corporations; but it applies to those comparatively unusual and formal contracts which can be made by (*i.e.*, which are within the powers of) the corporation, but are not within the powers delegated by the bank to its staff in order that it may carry out the everyday routine work of banking. Those contracts arising in the conduct of the ordinary business are often not written (though that may be done), often not even expressed in words, but are simply implied by law from the conduct of the parties.

The breach of any one of these simple contracts will lay the bank open to an action—*e.g.*, failure to collect a bill on due date might lead to a subsequent dishonour of the bill (or other damage), and the bank would be liable for the negligence of anyone, or of the chain of clerks in the bill office, and on the exchanges, or branch correspondence, through whose hands the bill passed. A more usual class of action is that in which the bank is sued for the wrongful dishonour of a cheque. In this action it is necessary to allege due presentation of the cheque, and it therefore offers an opportunity for illustrating what is within the scope of apparent authority and course of employment of a bank clerk. It is easy to imagine a great variety of cases, some of which might be very near the line. If a man took his own cheque to a bank and allowed himself to be bluffed out of the banking room by a stupid and officious messenger, I suppose he would not be able to prove due presentation; and I think

Effect of
breach.

CHAP. XX. it would be the same if a man should take a cheque not to the teller or ledger-keeper, but to a stupid exchange clerk, who, not grasping the situation, might say carelessly, "Oh, we can't cash that here!" And this brings us to a point where it is possible to put one's finger on the spot where a clear dividing line may be drawn; for if the same exchange clerk returned the same cheque to another bank, from whom it had come through the exchanges in a regular way, as dishonoured, and trouble arose, then, I think, the bank would be liable for the mistake of its exchange clerk, even though the cheque had never been seen by the ledger-keeper or other authority in the office through whom dishonoured cheques usually pass. I know of a case where the bank making the mistake paid £200 rather than contest the point. This assumes that the customary way, as between these two banks, of returning dishonoured paper is through the exchanges.

Liability for
torts.

The other class of cases which I referred to, illustrating the liability of banks for acts of its agent, viz., actions on torts, is not a part of the law of personalty, but, as the principle of liability of the banks for the acts of its agents is further exemplified, and the matter is of importance, I propose to discuss it in this place. The general rule is that where loss or injury is caused to a third person or a penalty is incurred by any wrongful act or omission of an agent while acting on behalf of the principal, either in the ordinary course of his employment or with the authority of the principal, the principal is liable therefor jointly and severally with the agent. In the statement of this rule you will notice again the phrase, "in the ordinary course of his employment," and it is the law that if the agent is not in such employ, but off on a freak of his own, the principal is not liable.

An interesting case, which in part illustrates this branch of the law, was *Owston v. Bank of New South Wales*. This was an action for malicious prosecution, damages being laid at £5,000. In the Supreme Court, in Sydney, the jury awarded £500 to Owston. The bank went to the Full Court for a new trial; was refused, and went to the Privy Council. CHAP. XX.
1879, L.R.
4 A.C. 270.

Owston had been improperly prosecuted in the Police Court in Sydney, in the name of the bank; hence these actions.

The trouble had arisen in the following way:—Bill at thirty days' sight, drawn by M. C. and G., of Adelaide, upon Owston, of Sydney; the bill was supported by shipping documents for a cargo of wheat shipped per "Seagull," and was sent to the head office of the Bank of New South Wales by its Adelaide office. A clerk of the bank left the bill for acceptance by Owston at his office. Before the acceptance had been called for, Owston received a telegram from his consignors: "'Seagull' put back to port leaky"; and in reply sent one asking for extension of draft to sixty days because of the delay. When matters were in this state, the bank clerk called for the acceptance. Owston showed him the telegrams, and they agreed to wait an hour. Without waiting a full hour, however, Owston returned the bill with his acceptance (which had been written upon it) cancelled. Subsequently he got a telegram from Adelaide that the bank had been instructed to extend draft to sixty days; meanwhile, however, the bill had been sent by the bank to Messrs. Allen, Bowden, and Allen, notaries and solicitors, to be presented for noting. A clerk, M, from the solicitors, took the bill to Owston's, and left it there, called again, but could not get it; then called again with a fellow clerk, B, who tried to bounce Owston. Both men lost their tempers. Owston did not know that these were not clerks of the bank. Owston then sent the bill to the

CHAP. XX. bank accepted as at sixty days. The bank did not acquaint the solicitors. Owston and B met in the street, but Owston refused to have anything to say to B.

It happened, according to the evidence given on behalf of the bank, that W, the acting manager, was at the solicitors' office, upon other business, talking to one of the partners, when another partner walked into the room and mentioned the matter of the bill and how Owston refused to give it up; W then said, "You got the bill from the bank, and will have to return it; you are responsible."

As a result of a conference among themselves, and, perhaps, with one of their chiefs, the solicitors' clerks then went to a magistrate, at the Police Court, and applied for a warrant for Owston's arrest; this was refused. A summons was issued, however, calling upon Owston to appear next day and answer a charge of feloniously stealing a bill of exchange, value £1,500, the property of the bank. The case was called on next morning. Owston appeared; the bank did not; and the case was dismissed. Then Owston brought his action for malicious prosecution.

When the case reached the Privy Council, the questions for it to rule upon were: (1) Were the proceedings authorised by W? (2) If so, was the bank liable? It is, of course, the view of the Privy Council upon the second point that is of interest here, and I extract the following paragraph from its judgment:—

Authority of
manager.

"The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency.

"The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be pre-

sumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and under some circumstances for his frauds in the management of such business (*Mackay v. Commercial Bank of New Brunswick*, L.R. 5, P.C. 394). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. CHAP. XX.

"These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority, in certain cases affecting the property of the bank, might be presumed from his position to belong to him at least in the absence of directors. The same presumption might arise in the case of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson." In absence of directors.

The judgment also went on to say, *inter alia*, "an authority, to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present." In case of emergency. And the Court thought that the facts in this case did not present a case of emergency or apparent emergency from which authority could be derived.

A point that was touched upon in the same case was this: Can a corporation aggregate, such as a bank, be liable for *malicious* prosecution? For a corporation is not like a human being with mind and heart capable of Liability for malice.

CHAP. XX

hatred, envy, and malice; how, then, can it have a malicious intention? Counsel for the bank, however, decided to make no attempt to argue this line of defence, and apparently thought it untenable, and the Court approved of this view.

Supra.

It is worth notice that in the case of *Mackay v. Commercial Bank of New Brunswick*, referred to in the paragraph just quoted, it was held that an action of *deceit* may be maintained against a company, whether incorporated or not, in respect of the fraud of its agent. In that case a bank clerk, whose duty it was to obtain the acceptance of certain bills of exchange in which the bank was interested (who was in fact known as the wind-raiser), fraudulently, but without the knowledge of the president or directors, made a representation to A which, by omitting a material fact, induced him to accept a bill, which he was compelled to pay; and thereby the bank profited. A was held entitled to recover from the bank the sum so paid, on the ground that, where one party has suffered and another profited by the fraudulent representation of an agent of the latter made within the scope of his authority, the former is entitled to recover damages.

14
N.S.W.L.R.
269.

Macauley v. Bank of New South Wales is another useful case on the point I have been considering. The bank was mortgagee of a station of which W was mortgagor in default. G, the local branch manager, put W in possession of the station as manager on behalf of the bank. Later on, W was burning fire trails round the station to protect it, but the fires spread and burned the crops, grass, fences, &c., of the plaintiff Macauley, who owned land adjoining the station, and who sued the bank. Two questions arose in the case as to scope of authority and ordinary course of duty, viz.: (1) Whether the local manager G had authority to appoint a station manager on behalf of the bank. It became unnecessary to decide

Branch
manager in
charge of
bank's pro-
perties.

this point, for the bank had, at any rate, ratified the appointment by allowing him to draw cheques upon it for the expenses of management, and had allowed W to remain in possession after the action was brought, when it knew he was alleged to be there as its agent. (2) It was decided that it was within the duty of a station manager to burn fire trails, and that the Court could take judicial notice of the fact that it was his duty.

CHAP. XX.
Ratification.

With regard to the first point, though the Court expressed no definite opinion, one of the Judges, Innes, J., inclined to the opinion that the local manager had no such power. Thus it seems that, had there been no evidence of ratification, it would have been risky for Macauley to bring this action, except he could be sure of proving that the branch manager in making the appointment had special authority from his head office. At the risk of repeating matter and using the same language over again, I will quote a sentence from the judgment of Martin, C.J., in the case first referred to, *Bremner v. Union Bank*:—

“Managers, acting managers, and clerks of a banking corporation cannot be presumed to be the agents of such corporations, except for the transaction of the ordinary business for which they were instituted. Where a corporation can be made liable for the acts of its servants (as in trespass) in the absence of express authority or ratification, the acts to bind the corporation must be done in the exercise of the servant’s ordinary duty.”

Test of scope
of authority
is found in
ordinary
duties.

PART III.

SECURITIES—BANKRUPTCY.

A bank, in the course of its dealings, has to do with almost every species of property recognised in law; but the securities which are most offered by customers, and accepted by banks in return for advances, may be considered in three large groups: (1) Mortgages; (2) Liens; (3) Guarantees.

CHAPTER XXI.

MORTGAGES.

CHAP. XXI. The term "mortgage" is applied to a conveyance of land or other property as security for the payment of money. Generally, a mortgage is made to secure the repayment of money borrowed by the owner of the property mortgaged, for which borrowing he incurs a debt which he is legally bound to repay out of whatever means he may possess.

Other terms may be agreed upon, but this would only happen in comparatively rare instances. It is most usual for the mortgage to be over the debtor's property, and to include an express covenant for repayment.

So far as a mortgage is a transfer of property, its object is to confer upon the mortgagee a proprietary right by the exercise of which (*e.g.*, sale of the property) he will be able to raise the money owing to him.

Generally speaking, all classes of property are mortgagable; there are, however, a few exceptions, as follows:

- (1) The salaries and allowances of public officers given for the purpose of maintaining the dignity of their office, or a due discharge of their official duties; half-pay or retiring allowances in certain cases; alimony.
- (2) Property settled in such a way that it is defeasible upon any attempt on the part of the beneficiary to assign it. (Valid provisions to this effect often occur in the case of life estates created by wills or family settlements.)
- (3) The property of corporations which have not, by their constitution, the power to borrow, or whose power to do so is limited.
- (4) The estates of married women, which have been subjected to a restraint upon anticipation, and the estates of infants and lunatics, are not mortgagable, except with the aid of the Equity Court.

It will be seen that these limitations attach to the owner or recipient of the property rather than to the property itself, and practically all forms of property are mortgagable.

At this point it is convenient to distinguish between mortgages of personal and real property.

Mortgages of personal property are usually effected by bills of sale, and these, together with stock mortgages and liens on crops and wool (securities which are frequently taken by bankers), will be found discussed in the next chapter.

Mortgages of Realty.—To explain the true nature of these instruments, it is necessary to refer to the difference between the equitable and the legal views regarding them. At law, a mortgage was (and in point of form still is; see later) an absolute transfer to the lender, of the land,

CHAP. XXI. or of such right to it as the borrower possessed. In the case of mortgages, we always speak of the lender as the mortgagee and the borrower as the mortgagor, *i.e.*, the one that makes or gives the mortgage.

This transfer of the ownership of the land was effected by the mortgage-deed. It was, however, qualified by a condition that, upon repayment of the loan on a certain day, the mortgagor should be allowed to re-enter and have his land again. And *at law*, if the condition were broken by non-payment on the appointed day, the conveyance of the land became absolute, and was discharged from the condition of re-entry. For a long time this harsh law, so much in favour of creditors, was literally adhered to, but the Courts of Equity stepped in eventually to the relief of debtors.

When, and upon what ground, this jurisdiction was obtained by the Courts of Equity is not quite clear. But probably at the end of the sixteenth century the Court of Chancery first granted relief to some unfortunate debtor, who was by accident prevented from making payment on the day fixed, and whose creditor upon the next day refused to receive payment and attempted to keep the land.

Having made a commencement, the Courts of Chancery exercised their powers more and more frequently, until in the reign of Charles II. the main principles of equity with respect to the redemption of mortgages were well settled.

Nature of a Mortgage.—The first principle established was the mortgagor's equity of redemption, *i.e.*, a right to redeem even after the date fixed by contract, upon payment of principal and interest and costs. To protect this principle a second step was soon necessary, for the cupidity of creditors would have led them to regain, if that were possible, their old advantages by adopting a new form of deed. The Court of Chancery was therefore

forced to a second step, which it boldly took, and laid down the principle, "once a mortgage always a mortgage," and that, whatever the form of the deed, the debtor cannot contract himself out of his right to redeem by agreement made at the time of the loan. But at a subsequent date the mortgagor may sell his equity of redemption even to the mortgagee.

CHAP. XXI.

Once a mortgage always a mortgage.

And other agreements between the parties made at the time of the mortgage will be good if they do not exclude the right to redeem. For instance, agreements giving the mortgagee a preferential right of purchase in case of sale; or an agreement not to call in the principal while interest is duly paid.

A good illustration of the effect of the doctrine "once a mortgage always a mortgage" may be found in the case of *Barton v. Bank of New South Wales*. It was a case which depended on the effect of an absolute conveyance of lands, containing no conditions for repayment nor any suggestion that the consideration money was by way of loan, but which, on the contrary, contained within itself an explanation of the agreement to carry out which it was executed. And it showed that, even in the case of so absolute a document, the doctrine "once a mortgage always a mortgage" would apply, and therefore evidence outside the document could be received to prove that the intention of the parties at the time it was made was that it should be by way of security only. Of course, in the face of such a document, the very strongest evidence would be required. [On the facts, the Court thought it beyond question that an absolute conveyance was intended, and the bank won.]

15 A.C. 379.

From the doctrine "once a mortgage always a mortgage" it follows as a corollary that the mortgagee cannot impose upon his debtor a stipulation in the mortgage which would prevent the mortgagor, upon redemption, from getting back his property in the condition in which

CHAP. XXI. he mortgaged it. Or, as it has been otherwise expressed, a mortgage cannot include a clog or fetter upon the equity of redemption.

This part of the law has received a great deal of explanation lately in cases upon the subject of *tied houses*.

It is a matter of common knowledge that among the breweries and public-houses with which you do business, as bankers, there exists a system whereby the breweries, using part of their capital by way of loans, succeed in tying to themselves a string of public-houses, whose licensees are prevented from purchasing their liquor in the open market, and are bound to deal with the one brewery for all it can supply.

This system has been most fully developed among brewers and publicans, but it prevails in other businesses, and, I believe, it obtains to some extent among the big financial and wool companies who compete with your banks in financing pastoralists, and who secure, in addition to interest upon their loans, the right to have the agency work to ship, insure, and sell the wool or other produce of the properties on which they have advanced money.

It has been decided that a stipulation, which is part of a mortgage, and which endeavours to provide that, during continuance and after redemption of the mortgage debt, the owner of the premises and his successors in title shall continue to deal with the creditor, is invalid and cannot be enforced, for otherwise the mortgagor would not be receiving back his property unfettered. It is said the whole doctrine, including this corollary, might be expressed in the formula "once a mortgage always a mortgage and nothing but a mortgage."

And nothing
but a mort-
gage.

Collateral
advantage
permissible.

A collateral advantage granted to the mortgagee to continue only during the mortgage is, however, allowable. It must be remembered that, from the creditor's

point of view, a mortgage is to serve two purposes— CHAP. XXI.
 (1) to be a security for the debt; (2) to provide remuneration for the money lent. Such remuneration is usually interest payable in money at a fixed rate and fixed periods, but this is not necessary; instead of an interest rate, or partly in place of it, or in addition to it, the creditor may obtain by covenant the collateral advantage that the debtor will not deal elsewhere; provided no unfair or unconscionable advantage has been taken of the debtor, in which case it would become voidable.

Within these limits houses may be tied by mortgage to any extent.

One result of the equitable protection afforded to the debtor was that a proviso that, in the event of the interest agreed upon not being paid up to time, a higher rate should be payable, was regarded in the light of an unfair penalty and invalid; however, the protection aimed at can be got by stipulation for a high rate of interest to be reduced by 1 (or any other rate) per cent. upon prompt payment, and such a clause will be found in most investment mortgages. Rate of interest.

In the forms of banks' mortgages, to the details of which I shall presently refer, interest is agreed for at the rate usually charged by the bank upon advances from time to time.

While explaining the nature of mortgages, it may be well to point out that a bona fide sale of property, with a bargain by the seller for the right of re-purchase, is well recognised in law as distinct from a mortgage.

Form of the Mortgage.—With regard to the form of mortgage-deeds, I shall refer only to the cases of mortgages of estates in fee-simple in freehold lands—(1) under the old system; (2) under the Real Property Act; and (3) mortgages of C.P. lands.

(1) *Under the old system* of conveyancing, the land is granted to the creditor in fee-simple with a proviso for

CHAP. XXI. reconveyance on payment of principal, and interest at a specified rate, on a certain day.

Usually the day specified is six months ahead or next quarter day, and the mortgagee covenants not to call in the principal sum before the expiration of the agreed term, so long as interest is punctually paid, and other covenants observed on the part of the mortgagor.

By the same deed the mortgagor generally enters into a personal covenant to pay principal and interest on the day appointed for reconveyance, and also to continue to pay interest at the same rate in case of failure to redeem at the appointed time. Other covenants not inconsistent with the nature of a mortgage may be inserted, as has been shown, and several such covenants are continually made use of to render the security more effective.

I have mentioned that a mortgage begins with a grant or conveyance of the lands to the creditor. The value of this grant depends, of course, upon the strength of the mortgagor's title, and the ascertainment of this involves, in most cases, investigation by an expert conveyancer.

I will now turn to the printed form of mortgage-deed in use by one of the banks. You will notice it takes about forty lines of closely-printed matter to make the mortgage. It looks exceedingly uninteresting, and reminds one of the saying of Lord Westbury, one of the wittiest and most cynical Judges that ever sat on the English bench: it was of conveyancing documents more old-fashioned and cumbrous than these. He remarked, they were "difficult to read, impossible to understand, and disgusting to touch."

Upon reading this document through, however, and leaving out all the apparently cumbersome extensions and enlargements of meaning, you will find that a very short and readable skeleton of it can be made, showing the nature of the document, thus:

"In consideration of £—— the mortgagor doth

hereby appoint and also grant and release to CHAP. XXI.
 the bank — all the lands — to have and
 to hold — subject to the proviso for re-
 demption. Provided — that if the mort-
 gagor—shall on demand* in writing—
 or without such demand — pay the said
 bank the said sum — and also pay interest
 — then the said bank will re-convey the
 mortgaged premises to the use of the mort-
 gagor or as he shall direct.”

This is really the essential part of the mortgage; but the document, as you can see (and you should refer to the actual forms in use in your own bank), contains beyond this a quantity of other matter. This other matter consists of a number of separate covenants designed to protect the mortgagee and avoid any necessity for litigation. In the document before me, a rough description of each covenant appears in marginal notes opposite each paragraph of the deed; chiefly they regulate the bank's power of entering upon the premises, or of sale, the position of the mortgagor with respect to mortgaged premises which he occupies, and insurance, repairs, and rates. The document, when completed, is a formal deed made under seal, and usually in the presence of two witnesses. Although it is most desirable to have witnesses, Witnesses. none are legally necessary to a common law mortgage, where the mortgagor is simply exercising his own powers. Should he be exercising some power granted him by deed, it is necessary to refer back to that deed, and ascertain whether any, and, if so, what witnesses are necessary to validate his acts. Formerly the mortgage-deed contained a proviso that the mortgagor should remain in possession until the date for payment, in which case he was in law in the position of a tenant to the mortgagee for that term. It is nowadays more usual to leave out this provision, and the mortgagor remaining in possession is legally in

* Usual in banks' forms instead of a fixed date, cf. p. 290.

CHAP. XXI. the possession of a tenant by sufferance. The form referred to above makes the mortgagor attorn to the bank as a tenant from year to year.

Until the first six months or first quarter day (or the term expressed for redemption) has expired, the mortgagor has a *legal* right to redeem the land on the day named for repayment. When that date has passed, the estate of the mortgagee becomes absolute in law, and the mortgagor has no right to the land except his equity to redeem.

The equitable rights of the mortgagor, however, are so well understood and so safely relied upon that mortgage-deeds are used as the most common form of security for loans, and continue to be drawn up in the strict legal form I have indicated.

(2) *Under the R.P. Act (Torrens' title).*—Much of the most valuable land in Sydney remains to the present day only transferable under the old system of conveyancing. But the greater part of the freehold land in New South Wales is under the Real Property Act (and though the names of the statutes differ, the same law is in force in all the Australian States and New Zealand, and is often known as the Torrens' System). The fact that land is under the Act is a sufficient guarantee of soundness of title; that being so, a search in the office of the Registrar-General readily discloses whether or not any encumbrances exist to interfere with dealings; if acceptable, security can be taken in spite of encumbrances; the land is readily mortgagable by a memorandum of mortgage in the form prescribed by the Act, in the ninth schedule. In this case, also, the banks and other large companies each keep their own printed forms. These necessarily follow the words prescribed by the Act so far as the actual mortgage is concerned, and these words constitute a simple formula—far simpler than the common law mortgage. Going through this formula in the

same way as before, it will be found the effective words CHAP. XXI. are:

“I — in consideration of £—— lent me by the bank, do for the purpose of securing to the bank payment of the principal sum and interest *hereby mortgage to the said bank* all my estate and interest in all the land particulars of which are scheduled hereunder.”

This is followed by a schedule where details of the lands are set out in tabular form. And this table is succeeded by the covenants agreed upon between the parties, which serve the same purpose as in the common law mortgage, and depend for their number and nature upon the business transacted and security required by the mortgagee. In the document I am now dealing with there are twenty-three separate covenants; that is, rather more than in the common law mortgage. But in addition to those which are to be desired in any case, there are here some further covenants rendered necessary to perfect the security. By the nature of a Real Property Act mortgage, the mortgagee does not have the legal estate. Therefore, in this document, the bank takes a power of attorney enabling it to lease the land should the debtor make default.

For where a mortgage is effected under this Act, it ^{Statutory} does not transfer the title to the land as under the old ^{powers.} system, though, in order that it may have effect as a security, the mortgagee is clothed with certain statutory powers which are in lieu of the legal estate, and in some cases co-extensive with the powers of an owner.

Some of the covenants in a Real Property Act mortgage are inserted to render those powers more rapidly available. In the case of such a mortgage, witnesses are necessary.

(3) *Mortgage of Conditional Purchase Lands.*—With regard to conditionally purchased lands, the Crown

CHAP. XXI. Lands Acts do not recognise, in point of form, a transfer by way of mortgage. There is only one form of transfer of conditional purchases dealt with in the Acts, and that is an absolute one. But a *bona fide* mortgage of C. P. Lands is not illegal; and if parties have agreed that the land shall be held by way of mortgage, the Court of Equity will enforce that agreement, and compel the transferee to hold the land as security only. Mortgages of conditional purchase land are effected by an ordinary common law mortgage, plus a statutory transfer. The common law mortgage protects the mortgagor, and gives the mortgagee a power of sale which he would not otherwise possess. The transfer must be there to obtain recognition of the mortgagee's estate by the Lands Office.

Hayward v.
Smith,
9 N.S.W.
L.R. Eq. 11.

Before the condition of residence has been fulfilled, the common law mortgage only, can be taken in completed form, but transfers of date blank may be taken by the mortgagee and registered immediately after the completion of residence. When the conditions imposed in respect of conditional purchase lands have been fulfilled, a grant in fee-simple of the land under the Real Property Act may be obtained upon payment of the necessary fees. To perfect a conditional purchase mortgage as security, it is necessary to insert covenants ensuring the due payment of instalments and of the fees to obtain the issue of the Crown grant.

Rights of Parties.—*With regard to the Mortgagor:* He has no right to redeem before the time appointed; in the absence of a provision that he may pay off at any time, which is found in banks' mortgages, but seldom in those of a private investor, the mortgagor must give six months' notice of his intention to redeem, and, if that passes, another six months', and so on; for, while the right to redeem is kept open for the mortgagor, it is fair the mortgagee should have time to look round for another investment. While he remains in possession, or

entitled to possession, the mortgagor has the free enjoyment of his property and a statutory right to sue in his own name to recover possession or rents or profits arising from the property, or to protect it from trespass. Owing to his position in law, he cannot, by himself, make a valid lease. This is so, too, in cases under the Real Property Act, though, in the latter case, the simple consent of the mortgagee will suffice. CHAP. XXI.

If the appointed day has gone by without redemption, he is liable (unless by special covenant) to ejectment by the mortgagee, though such an action would be stayed upon payment of principal and interest and costs. He is regarded in Equity as the owner of the same estate as before the mortgage, subject only to the mortgage. He may make a second and a third mortgage over the same property, or he may sell his equity outright.

With regard to the Mortgagee: He is in law the owner of the property, circumscribed in the exercise of his rights by equitable doctrine which will not let him obtain more than principal, interest, and costs; his remedies are:—

- (1) He may call in his money, and in the event of non-payment sue the mortgagor personally on the covenant contained in the mortgage-deed.
- (2) He may foreclose the mortgage. This is effected by suit in Equity in the case of common law mortgages; but in case of land under the Real Property Act, upon application to the Registrar-General. If the property will bring in sufficient money, it may be sold; otherwise foreclosure will be granted. The effect of this is that the estate of the mortgagee becomes absolute in Equity as well as in Law, and the right to redeem is cut away

altogether, for it is not fair that right should last for ever.

- (3) He may enter into possession of the property, after an action of ejectment if necessary, thus becoming mortgagee in possession, a position which Equity has made very burdensome by regarding the mortgagee as practically a trustee for the mortgagor, and most strictly accountable for the management and fruits of the property. Creditors avoid this course.
- (4) He has a right to sell the mortgaged premises. This right was formerly based upon a covenant always found in a well-drawn mortgage, but is now given by statute to every mortgagee under a mortgage by deed. The statutory power only arises upon certain defaults being made, *e.g.*, repayment of principal being a year overdue, or interest six months in arrears. The mortgagee has also, after such defaults, the power to obtain the appointment of a receiver.

A mortgagee may pursue all his remedies concurrently, but must, of course, cease proceeding as soon as his claim is satisfied.

The Discharge of a Mortgage at common law is effected by a reconveyance of the property in the terms agreed upon in the proviso for redemption. Alternatively, it may be effected by an acknowledgment written on the mortgage, signed by the mortgagee or his attorney, to the effect that the mortgage has been satisfied. Such an acknowledgment, when properly made and registered, operates as a discharge and as a reconveyance suitable to the nature and condition of the property by virtue of certain modern legislation contained, in New South Wales, in the Conveyancing Act. A Real Property Act

mortgage may be discharged by indorsement on the mortgage of a receipt in a very short printed form, "being in full satisfaction and discharge of the within obligation"; the discharge must be registered. CHAP. XXI.

Equitable Mortgages.—A very simple method of mortgaging real property is by equitable mortgage; such a mortgage is constituted by the mere deposit of title deeds as a pledge or by way of security.

It is better, perhaps, to have a written memorandum put with the deeds and signed by the mortgagor setting out the object and terms of the deposit.

"The absence of formality or delay commends this class of security to bankers; and, if taken and subsequently dealt with with due precaution, the protection is hardly inferior to that afforded by a formal deed."

Such a mortgage is always enforceable or realisable with the necessary aid of the Equity Court. Indeed, the chief difference between these and common law mortgages is in the procedure whereby the creditor enforces his remedy; for when he is armed with a formal deed, resort to the Equity Court is only sometimes necessary.

CHAPTER XXII.

PLEDGES OF PERSONALTY—BILLS OF SALE— LIENS—STOCK MORTGAGES.

CHAP. XXII.

Mortgage of
personalty by
bill of sale.

What the
term
includes.

The normal way in which a man mortgages personalty, to give security for a debt or obtain an advance, is by bill of sale. By the 7th section of the Bills of Sale Act the expression "bill of sale" includes not only bills of sale but pretty well every document of a like nature or that is capable of being used with like effect; it includes assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt; but does not include assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers, or assignment of any ship or vessel or share thereof, transfers of goods in the ordinary course of business, bills of sale of goods in foreign parts, bills of lading, &c. Most of the exceptions obviously should not be treated as bills of sale. With regard to ships, a special method for their mortgage is prescribed by the Imperial Act 57 and 58 Victoria, c. 60; and with regard to bills of sale over goods in foreign parts, there do not exist the same reasons why their registration and validity should be dealt with by any Act of Parliament of this country.

When a man gives such a security over his goods, and the secured creditor allows them to remain in the

possession or "apparent possession" of the party giving the bill, that party might, by reason of a well-to-do appearance, obtain credit to which he is not entitled, and this mischief the Bills of Sale Act aims at preventing; accordingly it is provided that, unless such a bill of sale be registered in the Supreme Court within thirty days, the security will be useless, in case of the debtor's bankruptcy, against his official assignee or trustees in bankruptcy, and useless, too, against the sheriff, or his officers, who may have to seize the goods in execution of a judgment against the debtor; and against every person on whose behalf such process of law has been issued. And not only should the security be thus registered, but it must be re-registered once at least in every twelve months, and a promise to give a bill of sale must, in order to make it equally good security, be registered and re-registered in the same way as a bill of sale itself.

CHAP. XXII.

Apparent
possession.

Registration.

The provisions of the Act apply to bills of sale over goods in the *possession or apparent possession of the debtor*, and it is worth noticing that the phrase *apparent possession* is wider than the order and disposition clause of the Bankruptcy Act. If, for instance, a proper demand has been made by a secured creditor for the delivery up of goods in the possession of a debtor, and the goods have not yet been delivered, they are, then, not in the order and disposition of the debtor, and therefore are not available for the benefit of all the creditors in the case of bankruptcy, though they are in his apparent possession.

Cf. *post*,
p. 334.

The term *personal chattels* in the Bills of Sale Act means goods, furniture, fixtures, and other articles capable of complete transfer by delivery, but not chattels real nor government securities, nor shares in companies or choses in action, nor the produce of any farm or lands which by virtue of any covenant or agreement or custom of the country ought not to be removed from any farm where they shall be at the time of giving the bill of sale.

Meaning of
personal
chattels.

CHAP. XXII. Besides these steps, that must be taken by the bill of sale holder to protect his security from the judgments of the higher Courts, it is necessary under the Small Debts Recovery Act, No. 13, 1899, to register at the nearest Court of Petty Sessions within one week of making the bill of sale, and then security against judgments of that Court is obtained, except such judgments as follow almost immediately upon the bill of sale (*i.e.*, where summons served on the defendant not more than fourteen days after he gave the bill of sale); this security extends to such articles as are specified in an annexure to the bill of sale. Further, if the document be given by way of mortgage, then a certain time, not more than a year, must be specified in it for repayment of the principal money, and the mortgage will not hold good for more than a year.

Such are the safeguards one must take to obtain fully such protection as the law allows to the holders of bills of sale.

Of course, the class of transaction that has been last referred to, where there is a danger of judgment creditors from the Court of Petty Sessions claiming upon the same goods over which security has been given, comprises chiefly the numerous small loans that are the business of the little money-lender, rather than the banker.

1894, 2 Q. B.
18.

Before passing from this subject the case of *Lady Ramsay v. Margrett* may be referred to. It illustrates the limits of the definition of a Bill of Sale, and also a point as to possession. Lady Ramsay's husband was in debt, and to help him she agreed to purchase for £1,700 all his furniture and plate, which were in the house where they both lived. She had separate estate which included some furniture of her own in the same house. She paid £500 down, and £1,200 more in five days' time, after arranging with her bankers. She stipulated that her husband should give

a receipt for the money, and this receipt was subsequently drawn up by her solicitors and signed. Lady Ramsay sent some of the goods to her own bankers, but there had been no formal delivery to her of any of them by the husband, and the bulk of them remained, as they had previously been, in the house in which the husband and wife lived together. Afterwards, those goods were taken in execution by a judgment creditor of the husband.

There arose, then, what is called an interpleader issue, where the wife came into court and claimed the goods were her property, and, therefore, could not be taken in execution by her husband's creditor. The execution creditor claimed that property in the goods passed to Lady Ramsay by the receipt, that the receipt was in effect a bill of sale, and had not been registered, and was, therefore, not good against him, no sufficient possession having been taken by Lady Ramsay.

It was held that the receipt was not an "assurance" of the goods to Lady Ramsay within the meaning of the Bills of Sale Act, but the transaction was a complete bargain and sale of goods, effectual without the receipt, which had been obtained simply as evidence of payment, and, consequently, the receipt did not require registration under the Bills of Sale Act.

It was held also, that the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either husband or wife, the law would attribute possession to the wife, who had the legal title. This result was reached by the application of a doctrine of law attaching possession to the title when, in case of dispute between the owner and another, the facts, as in this case, give no indication of a completer possession by one than the other.

There is another class of security. A form of mortgage of personalty, which is of very much greater import-

CHAP. XXII.

See ante, p. 98.

A receipt not an assurance.

Possession of wife.

CHAP. XXII. ance to the banker, and deals usually with larger interests, to which I propose to turn your attention. I refer to express general liens, liens on crops, wool, and stock mortgages.

It will be convenient to deal first with the subject of liens.

Liens.—A lien is a right which a person in possession of a thing has to retain it in his possession, in the teeth of the true owner, until a debt due to him has been satisfied.

Possession
essential.

The right of possession given by a lien enables the lienée to maintain *trover* if the goods are wrongfully converted to the use of someone else, or taken out of his possession; but if the lienée give up possession, the lien is lost and this privilege reverts to the owner. A lien is also lost by the holder taking a particular security, independent of the lien, for the same debt.

Ante, p. 18.

Liens are Particular, and General.—A particular lien arises by law in favour of any workman to whom a chattel has been delivered in order that he may improve it by his labour or other services, and extends over that particular chattel for the debt which has arisen in respect of it: *e.g.*, a farrier in whose possession a horse is, and by whose skill it has been rendered manageable, has a lien over the horse for his charges.

General liens arise in respect of a general balance of account either by express or implied contract; from customary commercial law, a banker has a general lien over securities and documents deposited with him *as banker* by a customer, and may therefore retain them against his customer in respect of debts due. This general lien is implied from the relationship of banker and customer; it is not very far-reaching, as it cannot extend over documents which would not in the ordinary course of business be deposited with one's banker, nor to documents of whatever nature if deposited under some other and ex-

See *ante*, pp.
16, 17.

press contract, as for safe custody; but the banker's lien CHAP. XXII. will extend over documents left with a bank for collection in the ordinary way, and over some other documents.

Express Liens.—It is, therefore, very usual for bankers to make with their customers contracts, giving them an express lien upon bills, documents of title, bond warrants, share certificates, &c., deposited with them for that purpose by their customer; and such express liens, when fortified with sufficient powers of realisation (usually given to the bank in the same document) constitute a very good and useful class of security.

I propose to refer to specimen forms used by two different banks for this class of transaction. The first step in the document in each case is the granting to the bank of a lien, in consideration of advances, the lien to be over a long list of documents described in general terms, or any or such of them as may belong to the lienor and be in the possession of the bank during the currency of the lien. The document is so worded as to constitute an equitable mortgage over the property involved, together with an undertaking to make a formal mortgage if required. There follows authority to the bank to sell the warrants, stocks, shares, scrips, &c., at its discretion. Various other powers and agreements are included. Of all these, one of the most important, and one which no such security should be without, is an appointment of the bank or some officer, usually the general manager or chief officer for the State, or manager of the branch whose business it is, as attorney for the debtor. This power of attorney Power of attorney. is drawn so as to empower the bank to do in the debtor's name and upon his own signature as his attorney all that the debtor himself is bound to do to give due force to the security. In this way, the bank, having taken such a security may avoid the serious complications that might otherwise arise in the case of an absent or obstinate debtor.

CHAP. XXII.

Liens on Wool and Crops, and Stock Mortgages —

I have shown that the normal method of mortgaging personal property in possession is by way of bill of sale, but owing to the vast stations and large flocks common throughout Australia, a great many difficulties formerly arose which showed how useless the ordinary bill of sale would be as a security for money advanced upon stock. Questions whether the progeny of mortgaged sheep were intended to be included, and questions as to the identification of the stock intended to be embraced in the mortgage, would arise. The need of squatters and farmers for ready money at the time when their flocks have to be shorn, or crops to be gathered and the produce sent to market, causes a frequent resort to this class of security to raise upon it temporary or further accommodation. And I believe it is correct to say that all banks that do business in this State and throughout Australia very frequently have occasion to accept as collateral security mortgages of stock and liens over wool and crops.

This feature of Australian financial business, and the inutility of the common bill of sale for the purpose, have been the causes of special legislation on the subject, which is peculiar to this country.

Legislation.

New South Wales was, I believe, the first colony to pass an Act on the subject, but similar legislation has been in force in all the States of Australia for some considerable time. In different States the Acts differ in some of their details, but in their main features they are similar.

The legislation on the subject in New South Wales has a long history; the first Statutes were experimental; presently one was made permanent; then further amending Acts were passed.

Until the recent consolidation of the Statutes, the principal Acts on the subject were those of 1847, 1860,

1868. It was in 1868 that the right was first granted to the mortgagor of sheep, with the consent in writing of the mortgagee, but not otherwise, to give a valid lien on the next ensuing clip of wool of those sheep. In addition, there was the Liens on Crops Act, 26 Victoria, No. 10, which validated liens on agricultural and horticultural produce, subject to certain provisions, and gave protection to the lienee (who should be a person making any bona fide advance of money or goods to any holder of land, on condition of receiving as security for the same the growing crop or crops of agricultural or horticultural produce on any such land).

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Right of mortgagor to give lien.

Liens on produce.

This series of Acts is among those that have been recently consolidated, and the legislation on the subject is now contained in the (consolidating) Act, No. 7, of 1898.

Act No. 7, 1898. In Vic. Cf. Instruments Act.

Briefly, the provisions which govern this class of security are as follows:—

A form is given by the Act for liens on produce; another for liens on wool; and a form of particulars for a stock mortgage, showing the round number of the stock, their description, their brands, the stations and places where they are depasturing, the name of the principal superintendent or overseer, the date of the deed, the names of the parties, and amount of consideration, with the name of witness or witnesses.

Forms prescribed.

Most banks use their own printed forms for these securities, and these forms follow closely the words of the forms given by the Act. As to liens on wool, it is to be noticed that the vagueness which was in the absence of legislation on the subject an impediment, interfering with the creation of a valid security by way of Bill of Sale, is now got rid of; for, according to the words of the prescribed form, the lien is given “upon the wool of the next ensuing clip to be shorn from my flocks of sheep, consisting in number of (so many) or *thereabouts*, and now *depasturing* at (such and such a place).”

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Transfer. As has already been noticed, liens on wool and stock mortgages are transferable by endorsement, and the indorsee will have the same rights as the original lienee or mortgagee; but this does not appear to be the case with regard to liens on crops.

Registration. All three types of security are taken out of the operation of the Bills of Sale Act. All three, however, require to be registered within thirty days. Registration is effected in the office of the Registrar-General, in Sydney. The advance in respect of which the security is obtained

Advance. must, of course, be bona fide; when that is so, the lien will be good whether given before or after or at the time of making the advance. While the lien is in force, the possession of the proprietor is for all intents and pur-

Possession of lienee by force of statute. poses in law the possession of the lienee, but when the advance is repaid, property and possession of the wool revert in the lienor; the same in the case of crops. The

Rights. lienee will not be prejudiced by the subsequent mortgage of the stock on which the wool is. If the lienor fail to shear at the proper time, the lienee may step in and shear at his expense, and like provisions obtain with regard to the gathering of crops. In the case of all three securities, a fraud committed by the lienor or mortgagor in respect of the security will render him liable to punishment for an indictable offence.

Rights of landlord or mortgagee. In the case of a lien given over crops on leased land, a preferential claim is allowed to the landlord in respect of rent which may be due at the time of carrying away the crop, not exceeding one year's rent; and it is the duty of the lienee to pay this before removing the crop, but he may repay himself out of the proceeds of sale. And in case the land is mortgaged, and is at the time of harvesting in possession of the mortgagee, a like claim for one year's interest is provided for.

One effect of the provision that the possession of the

lienor or mortgagor shall be to all intents and purposes CHAP. XXII. the possession of his lienee, is, to take these valuable effects outside the provision about goods in the order and disposition of a bankrupt in bankruptcy law, so that the secured creditor, holding one of these liens or stock mortgages, is, in case of the debtor's bankruptcy, and provided the property is still in the possession of the debtor, safe as against the official assignee. In the case of a stock mortgage, however, either the mortgage must have been executed at least sixty days before the making of the sequestration order, or the consideration must be a present advance.

Either a lien on wool or on crops or a stock mortgage See post, pp. 327, 339. would be liable to be impeached under the Statute of Elizabeth, if made with intent to defeat or delay creditors, or under the Bankruptcy Act, if it should actually be an improper preference.

Although some vagueness of description is necessarily allowed, a reasonable accuracy in description Reasonable accuracy requisite in stock mortgage. should be aimed at; and a deliberate or careless inaccuracy would be dangerous. In a Victorian case where the horses mentioned in a stock mortgage were, at the time of making the mortgage, working at a place three miles distant from the land described in the document, the error was held to be fatal. In a New South Wales case, *in re Geoghegan*, it was held to be necessary that 18 L. R. B. & P. 26. the brands of the mortgaged stock should be clearly specified in the registered memorial. Under the Victorian Act a mortgage of horses in a stable cannot be registered as a stock mortgage. These cases show how without due care advantages and securities intended to be given by law may easily be thrown away.

A question that might arise, where a bank has taken Authority of a branch manager. this class of security, is this:—Suppose the customer C, who has given the security and obtained credit from a branch of the bank, is shifty, and about to take steps to

CHAP. XXII. defeat the bank's security; suppose that the branch manager has knowledge of this, and believes he can save the bank from loss by seizing C's sheep or other stock, would he be justified in doing so without instructions from head office? The question being, does his authority as branch manager extend so far? This question arose here in 1896 in the case of *Bremner v. the Union Bank*, and on the facts before them in that particular case the Court decided that, without express evidence that the manager had been given such authority, it would not do to assume that it was as a matter of course within his authority, the extent of which was to be gathered from his ordinary, and not his unusual, duties.

Mortgaged
stock.

17
N.S.W. L. R.
74.

Limitations in
bank's power
to take
security.

Before leaving this subject I would like to point out that, though certain securities are entirely in accordance with law, and may be taken over certain classes of property; over one kind of property by one method and over another property by another method—as the law may be; it is nevertheless necessary for the banker about to accept such a security to be clear that his own bank can deal in that class of security; for occasionally banks are, or were, prohibited by their charters or statutes of incorporation from advancing money upon the security of merchandise. In 1870 the South Australian branch of the National Bank of Australasia had limitations such that it was not lawful for the Bank to advance or lend money upon the security of lands, houses, &c., which involved it in litigation; about the same time the South Australian Banking Company had in its charter a clause declaring that it should not be lawful for the company to advance money on the security of merchandise; and advanced money nevertheless on the faith of receiving as security a preferential lien on wool; this bank, too, was involved in litigation by the transaction. A prohibitory clause is frequently inserted in a bank's

National
Bank v.
Cherry, L. R.
3 P.C. 299.

Ayers v. S.A.
Banking Co.,
L. R. 3 P.C.
559.

charter which prevents the lending of money upon ships. CHAP. XXII.
In some such cases, though the bank cannot lend on the forbidden security, it can acquire it as property in satisfaction of a debt. But the officers of the bank might be liable to the shareholders for a breach of duty. Or the bank might be liable to have its charter cancelled, &c.

In Victoria, by the Banks and Currency Act, 1890, any incorporated banking company may, notwithstanding anything to the contrary contained in any Act in force in Victoria relating to such bank, advance money on the security of lands, houses, ships, or pledges of merchandise.

CHAPTER XXIII.

GUARANTEES.

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Use of.

Guarantees constitute a very common form of security. When the debtor and his guarantors are substantial men, or substantial having regard to the amount of the debt, and of known honesty, a guarantee affords a very sound security. Sounder perhaps in the case of private persons than when the debt is incurred by a small company of no long standing, a church in struggling circumstances, or an ill-managed municipality. For when men are constrained by reason of their positions as directors, churchwardens, aldermen, &c., to become guarantors for the debts of some institution, they do not as a rule seem to feel their personal honour involved in the same way as in the case of private debts. In such cases, therefore, there is need for great caution that the agreements in, and in connection with, the guarantee should be quite clear and free from the chance of a misunderstanding. In particular, it is well in such cases if personal liability on the part of the guarantors is contracted for, to have the guarantee signed, after some reference to its terms, in the presence of a responsible officer of the bank and by all the guarantors at the same time. By this means the bank will be forearmed against any assertion that might be made later on by the guarantors that they undertook the obligation in their representative capacity only, or that some signed upon one and others upon a different understanding. Indeed, this precaution is a wise one to take in all cases. For, take

Practice as to signing.

the case of a guarantee for a private account to be given by three friends of the debtor. Suppose the sureties are allowed to sign separately, and two of them do so, in the faith that the bank will obtain the third signature; for some reason this is not done. The guarantee is imperfect and useless.

A guarantee must be in writing, for by the Statute of Frauds no action shall be brought upon a contract to answer for the debt of another unless the agreement or a note of it be in writing and be signed by the party to be charged or his agent; the primary liability of the debtor must continue, or the contract would not be one of guarantee. The agent need not in point of law be appointed in writing, though to take the signature in such a transaction of an agent not appointed in writing would be exceedingly foolish unless ample and durable evidence of authority existed; in practice, I suppose a bank would never do such a thing. Writing
necessary

A guarantee must be supported by some consideration, that is, something must be given for it by the bank. It will not be any consideration, for instance, if you have an unsecured advance, and induce some third person to guarantee the customer's account in consideration of making such advances to him as you may see fit, and you then, having obtained that guarantee, open a new account for the customer, and get him to give you a cheque on such new account for the amount of the old advance, which cheque you pay into the credit of the old account and then close up the new account and call up the guarantee. If you want a good guarantee to secure an existing debt, and do not propose to make further bona fide advances to the customer as consideration for the guarantee, you must support it by something more than a mere pretence of making advances. A forbearance from pressing for payment may constitute a real consideration. Consideration
must be
given.

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Need not be expressed.

The consideration for a guarantee need not be expressed on the face of the document, though it is always better if it is so expressed. It is sufficient if it is actually given.

Continuing.

The guarantee for an ordinary bank overdraft must be continuing, which has been defined as "extending it beyond the first sum advanced to sums subsequently advanced so long as the guarantee is continued," or as "contemplating the continuance of a supply on the one side and on the other a liability for any default during that supply." That is to say, the guarantee must not be exhausted the moment the amount of the stipulated advance has been made, but it must cover, so long as it continues in force, all advances made up to the limit, notwithstanding that the account may from time to time have been in credit.

By corporation.

If the person giving the guarantee be a corporation, it is necessary to ascertain that the giving of guarantees in such a case is within the powers of the corporation and the manner of executing it is within the powers of its officers.

Bank to be named.

In order to enforce the guarantee, the bank must be named therein, though its signature is not necessary.

Variety of guarantees.

Guarantees are of all kinds and forms. We are concerned here only with guarantees to secure the payment of money. Even these are very various. Sometimes they are guarantees for the payment of a specific sum, such as the amount of a bill of exchange. Sometimes they are guarantees for only a portion of the debt, or they may be continuing guarantees for a definite or indefinite time, and for a definite or indefinite amount. They vary with the circumstances of each particular case.

Sureties.

The most important point to remember is, that as soon as a guarantee has been taken, other parties are involved besides the principal debtor and his creditor. I mean the surety or sureties. They are under a serious

obligation under the guarantee. It is therefore unfair to them that the contract between the principal debtor and the bank should be altered behind their backs, and it is a very firm and strictly applied rule of law that any material variation of the contract between the bank and its customer, behind the back of the surety, will have the effect of releasing him from his engagement except in the case of a contract to give further time to the debtor whereby rights against the surety are expressly reserved, Giving time. but if rights are not so reserved, such an arrangement will avoid the guarantee just as any other variation.

But a binding contract for extension of time will Forms in use. not release a surety at whose request it has been made; although any co-sureties who did not know and concur in the arrangement would be released; that is, unless rights had been reserved by the creditor.

I will refer now to two forms of guarantee actually in use. The first is one for the case of two or more joint and several guarantors. The first step is to assume joint and several liability, thus:—"We, —, jointly and severally, hereby guarantee the payment —."

This is for the reason that joint and several liability is more beneficial to the creditor and thus provides a better security for the bank. Next as to payment. This is agreed to be made upon receipt of a written request for payment, or upon revocation of the guarantee; until one of these things happens a debt is not actually due to the bank by the sureties, and thus the Statute of Limitations does not begin to run until steps have been taken to call up or pay off the guarantee. The document proceeds to describe the advances and charges repayment of which is guaranteed, limiting within a fixed sum the liability of sureties for the principal debt and stipulating liability for interest in addition to that sum if necessary. It is arranged that the guarantee shall be a continuing one,

irrespective of any sums paid in to credit of the account, and thus it is suitable to the ordinary case of a fluctuating account varying from day to day within certain limits of overdraft. If the stipulation for the continuing nature of the guarantee had not been inserted, the rule of law known as "the rule in Clayton's case" would have come into operation, and the first drawings would be taken as paid off by the earlier credits in order of time; so that after a few operations on the account the overdraft originally contemplated and guaranteed might be said to be paid off, and a new one to have arisen not covered by the guarantee.

It is also agreed that the bank may give time or indulgence to the debtor without losing his guarantee.

There is another special agreement which I find inserted in this form. It is to the effect that, notwithstanding any rule of law or equity to the contrary, all and each of the persons *who actually sign* the guarantee shall be and become jointly and severally liable to the bank in the manner and to the extent limited by the document. This seems a very useful clause to preserve to the bank the security of the guarantee in spite of a misunderstanding at the time of taking it as to the number and names of co-sureties; or in case of an accidental omission on the part of the bank to secure all the signatures agreed upon. This form is not under seal; thus it records a simple contract only, and the period after which a stale debt would become irrecoverable under the Statute of Limitations is six years, which would commence to run from the date of receipt by the sureties of a written request for payment from the bank, and not before.

For comparison with the document I have just dealt with, and by way of further illustration, I will turn to the other form.

This document is so drawn that upon completion it constitutes a formal deed, being under seal. It is there-

fore, enforceable for a period of twenty years, which, looking at the clauses of the deed, would begin to run from the date of cancellation of the guarantee by the sureties, or from the date of default being made by the debtor to repay the bank upon demand. The agréments that the guarantee shall be a joint and several one, and a continuing guarantee, are contained here, and make the document the same in its general effect as the one first described. The minor agreements, however, are not to the same effect. There is here provision that the bank may release or compound its claim against a surety without prejudice to its right against the others; there is not, however, the clause by which each surety signing makes himself liable in any event, waiving his right to disclaim in case of omission to obtain all the stipulated signatures.

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It is theoretically possible to draw up a guarantee in so strict a form that a surety upon signing the instrument becomes immediately liable, and remains entirely in the bank's hands with regard to its treatment of the principal debtor, its dealings with co-sureties, and its dealings with other securities held in respect of the same debt. If a bank, however, were to proceed to do business armed to the teeth with documents of this sort, it would probably find very little business to do, and good accounts would be driven to a bank that relied upon simpler instruments and the discretion of its staff.

A perfect
guarantee.

There are, however, certain provisions which should be found in every well-drawn guarantee, and which are necessary to legally perfect the security.

Thus a well-drawn guarantee should negative the right of the guarantor upon payment of the debt, or his share of it, to the benefit of any security of the customer's held by the bank in respect of the same debt, until the whole debt or debts owing to the bank by the custo-

Provisions re
collateral
securities.

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Surety's right
to stand in
shoes of
creditor.

mer are paid. For in the absence of such a clause, the surety who pays the amount owed by the principal debtor is entitled to be put in the shoes of the principal creditor, and have his securities for use against the debtor; and if the surety has paid up the amount of his own liability, but some of the debt remains, he is entitled to share rateably with the creditor in the securities. If the amount for which the guarantor is liable covers the whole of the customer's debt, there can be no objection to his taking the securities; but if the guarantor's liability does not cover the whole of the customer's debt, and the other securities held have to be apportioned between the bank and the guarantor, the bank may find its share of such securities insufficient to satisfy the balance owing to it. If, however, the guarantee and the other securities have been taken to secure *different* advances of the same account, the guarantor is not entitled to the other securities or to any benefit in them unless he chooses to pay the whole of the advances made to the customer. The right of the guarantor to any securities held by the bank exists, whether or not he was aware that the bank held them. If the bank by its own act has lost or destroyed or discharged any of the securities, the guarantor would appear to be discharged at least to the value of the securities so lost or destroyed or discharged.

Securities
lost by bank.

Provision in
case of
bankruptcy.

For reasons somewhat similar to the above, the guarantee should negative the right of the guarantor to prove in bankruptcy in competition with the bank against the estate of the customer.

Enforcing
guarantee.

The bank's power to enforce the guarantee comes to an end, if the guarantee is not under seal, at the expiration of six years from the day on which it first became able to recover the amount from the guarantor by an action at law. If the guarantee is under seal, the time is extended to twenty years.

If the guarantee expresses that the amount guaran-

teed is to be payable on demand in writing signed by some officer of the bank, the bank cannot bring an action against the surety until after it has made such demand on the customer, and consequently the recovery of the amount from the surety is not barred by the Statute of Limitations until after six or twenty years, as the case may be, from the day when written demand was made for payment, although a much longer time than six or twenty years may have elapsed since the last advance to the customer.

If the guarantee expresses that the amount guaranteed is to be payable on demand, then it would appear from the decision in the case of *Parr's Banking Company, Limited, v. Yates* that the Statute of Limitations begins to run as to each item of the principal as soon as that item is advanced, and that the whole of the principal ceases to be recoverable at the end of six or twenty years from the date of the last advance. With regard to interest, it would appear that the bank could recover six years' interest notwithstanding the recovery of the principal was barred by the statute, provided that the guarantee were a continuing one expressly guaranteeing repayment of the principal sums advanced, "with interest, commission, and other banking charges." The like with regard to the commission or other banking charges, if any, accrued with the six years preceding date of action.

It is well to bear in mind that the Statute of Limitations does not extinguish the debt; it merely bars the right to recover it in an action if the defendant chooses (as he always does) to set up the statute as a defence to the action. For example, if you hold a guarantee not under seal, the amount secured by which became payable more than six years ago, and you also hold title deeds deposited by the guarantor in support of the guarantee, together with an irrevocable power of attorney from him

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* XXIII.
Statute of
Limitations.

1898, 2 Q.B.
460.

Cf. Paget,
312.
Cf. Coml.
Bank of Aus.
v. Colonial
Finance, &c.,
4 C.L.R., 57.

Statute-
barred debt is
not
extinguished.

CHAP. XXIII. • authorising you to sell and convey the property comprised in the deeds, you cannot recover the amount by an action against the guarantor, and he cannot compel you to give up his deeds; you, however, can sell his property, and apply the proceeds in satisfying the guarantee, accounting to him for any balance that remains over.

If you are fairly acquainted with the terms of the agreements which your own bank enters into, it is not very necessary to know the effect of the general law upon guarantees whose stipulations differ from yours; you do not require to know every loophole by which a surety may escape from a guarantee other than that which your bank uses; but it would indeed be well to remember the general rule and advice expressed in the following paragraph:—

Cf. Paget.

“The acts or defaults which would release the surety outside those generally provided for in a well-drawn guarantee, are such as a bank can readily avoid, if it bear in mind the salutary rule that there must be no variation of the contract, no dealing with the principal debtor, or a co-surety, or with the securities for the debt, behind the back of the surety or without his consent, either given by anticipation in the guarantee, or prior to such dealing.”

CHAPTER XXIV.

BANKRUPTCY.

A man who is unable to pay his debts, as they become due, from his own moneys is insolvent; but insolvency is not bankruptcy in a strict and legal sense, no matter how much alike the two words may be in literary usage. The term bankruptcy expresses the condition in law of an insolvent, who has come under the operation of the bankruptcy laws, that is to say, of a man who has committed an act of bankruptcy, been made bankrupt, and whose affairs are subject to the bankruptcy jurisdiction of the Supreme Court. It is important to notice the distinction between these terms; for all insolvents are not bankrupts. The commercial wreckage in England, for example, in the year 1895, amounted to 7,858 insolvencies. Of these a little over 4,000 were administered in bankruptcy, and the balance, not much less than half, under private deeds of arrangement. Thus there is no law which prevents a debtor from settling privately with his creditors, if he can. *Private assignments* of this kind have no place in the Acts regulating bankruptcy procedure, and can, therefore, only operate at common law; as a result they will only be effectual to give the debtor a release when they are signed by all the creditors. To make a proposal for such a composition is in itself an act of bankruptcy, and as creditors can thereupon drive the party making such an offer into formal bankruptcy, they have, in such a case, a handle whereby to compel the debtor to open and fair dealing.

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Bankruptcy
and
insolvency.

Private
assignments.

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If in such a case the debtor makes a bona fide compromise with his creditors *for the benefit of all of them*, and to that end assigns his estate to trustees, he is, for all practical purposes, safe against the claims of any creditor who stands out unreasonably; for, though that creditor could sue and obtain judgment, he would find no goods to levy upon, for the Court would not set aside the assignment. Again, the assignment of his property to trustees for creditors is another act of bankruptcy, but the statute provides that this act cannot be made available for a petition, unless the petitioning creditor or creditors represent one-fifth in value of all the creditors; and even then the Judge will not make a sequestration order if it appears to him that it will be for the advantage of the creditors that the estate should be administered under the deed.

In practice among business men it is becoming more common to settle an insolvent's affairs by means of private deeds of arrangement, and of late less recourse than formerly is had to the Bankruptcy Courts.

Assignment
to trustees
with adminis-
tration sub-
ject to Court.

But another course, sometimes more convenient, is administration by trustees under the Bankruptcy Court; this is a mixture of the ordinary bankruptcy practice with the advantages of private arrangement and management of the bankrupt's affairs. In such cases the usual bankruptcy petition is filed, the order for sequestration made, and the official assignee appointed; but creditors are allowed by the statute at the first meeting of creditors, in some cases at a later meeting, to appoint one or two persons, who need not themselves be creditors, to be trustees of the estate, either in place of or conjointly with the official assignee. The creditors may require the trustees to give security. The election of a trustee or trustees must be confirmed by the Judge, who will require to be satisfied; (1) that the trustee has, in writing, accepted the office; (2) that he has given the required

security, if any. Any creditor may object to the confirmation of a trustee upon certain very general grounds, such as, that the appointment was not made in good faith, that the person chosen is unfit to be a trustee, or not likely to be impartial, &c. So that here again creditors have a handle wherewith to secure honest and efficient administration of the estate. The effect of the order of confirmation, when made, is at once to divest the bankrupt's estate from the official assignee and invest it in the trustees, who thereupon become joint tenants of the bankrupt's property, and in their administration of the estate are subject to the control of the court. If the creditors require an additional safeguard to their interests, they may at any meeting, by an ordinary resolution appoint a committee of inspection. Such a committee, if appointed, acts by majority, and must meet at least once a month; it may fix the remuneration of the trustee; may fill a vacancy in the office of trustee; and may control and authorise the trustee or the official assignee in the doing of certain acts, such as carrying on the business of the bankrupt so far as may be necessary to advantageously wind up same, carrying on an action relative to property of bankrupt, employing a solicitor, referring disputes to arbitration, mortgaging property of bankrupt, dividing in its existing form property which cannot be advantageously sold, making allowance to bankrupt for support of his family, &c., &c. A committee of this kind may be appointed at any time during the administration, and may be used, whether the administration is by trustees, or by trustees and the official assignee conjointly, or by official assignee alone. A resolution of creditors passed at a general meeting will override a direction of the committee.

As it is the object of the present chapter to indicate the consequences of bankruptcy, as it may affect bankers

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in particular, it will be sufficient to have noticed the fact that insolvencies may be dealt with in various ways, which must not be confused. In what follows, the administration of the bankrupt's estate will be supposed in all cases to be in the hands of the official assignee; but it will be proper in the first place to see how a man becomes legally bankrupt, and what is the status and authority of the official assignee.

Bankruptcy
as a peculiar
legal status.

Bankruptcy as a peculiar legal status is quite a modern idea. No doubt the problem of insolvency is one which has presented itself in all countries, in all ages. In communities in an early stage of development the strict law of debtor and creditor is left to take its course, and the debtor who could not pay used in many countries to be at the mercy of his creditor, to the extent of paying with his person, or selling himself into slavery. Early Teutonic codes show a similar severity; the insolvent debtor falls into the hands of his creditor, and is subject to personal fetters and chastisement. It has been pointed out as worthy of remark, that our common law knew no process whereby a man could pledge his body or liberty for payment of a debt; neither, at common law was the body of the debtor liable to execution for debt, except in the case of the king's debtor. The story of debtors' prisons, however, would be a thing apart from the scope of this chapter.

Development
of bankruptcy
law.

In Rome in the time of Julius Cæsar a debtor became entitled to his discharge on ceding his goods to his creditors. The introduction of this principle marks the commencement of the true doctrine of bankruptcy. In English law it was not until late in the reign of Henry VIII. that the first rude foundation of bankruptcy law was laid, by a statute "against such as do make bankrupt." This statute, 34 and 35 Henry VIII., c. 4, recites that "divers and sundry persons, craftily obtaining into their hands great substance of other

men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience." This extract shows that the Act was clearly directed against fraudulent debtors. Since that Act there has been a continuous stream of bankruptcy legislation: each Act adding something to the law on the subject, not only by way of further regulations and improved procedure, but also increasing the scope of the law, as different Acts proceeded from different motives. The eye of the Legislature was at first bent on fraudulent debtors and punishment simply; later, Acts were aimed at the relief of those who without fraud or gross negligence had become insolvent; traders were at first discriminated from non-traders, but subsequently the benefits of bankruptcy were opened to all. The doctrine of "protected transactions" was once an innovation. And in the earlier days of bankruptcy law there was no provision for proving debts payable at a future date. It will be seen, therefore, that the bankruptcy law in force to-day is the result of a long list of statutes which represent experimental legislation. Many principles and methods have been tried, and what has proved useful and workable has been conserved.

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First aimed
at fraud.

Relief of
unfortunate
debtors.

Protected
transactions.

Future debts.

In New South Wales the law on the subject is found mainly in the Bankruptcy Act, 1898, a consolidating statute which corresponds in a large measure to the English Act of 1886. In the other Australian States similar statutes are in force; but what follows in this chapter is based on the New South Wales Act.

N.S.W. Act
No. 25, 1898.

It is to be remembered that the earlier bankruptcy law of this colony was directed almost exclusively to "the relief of insolvent debtors," and that the present Act

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Objects of
statute.

is designed to give effect to three different principles—each equally good objects of bankruptcy legislation—viz.:

- (1) Relief of the unfortunate but honest debtor;
- (2) The equal and speedy distribution of the debtor's property among his creditors;
- (3) The defeat and punishment of the contrivances of fraudulent debtors.

The present Act is a combination of two systems. It allows the utmost freedom to the creditors in the realisation of the assets, while the conduct and dealings of the debtor are kept strictly under the control of the Judge. This is a fair recognition of the principle that in a bankruptcy proceeding the estate belongs to the creditor, but the debtor belongs to the law. Accordingly, under the present Act, every debtor who becomes a bankrupt is compelled to furnish a statement of his affairs to an official assignee, to undergo a public examination in open Court, and to apply to the Judge before he can obtain his certificate of discharge. So much is necessary to describe in outline the supervision of the bankrupt. As for the assets, the creditors may, as has been already pointed out, take over the administration or leave it to the official assignee.

Jurisdiction.

The jurisdiction created by the Act is vested in a Judge of the Supreme Court, who is appointed to be the Judge in Bankruptcy, and has exclusive jurisdiction over all questions in any way relating to a bankruptcy, whether raised by the debtor or his creditors, or by the trustee, or between third parties; and the Judge is not subject to be restrained in the execution of his power under the Act by the order of any other Court, nor will any appeal lie from his decision except in the manner directed by the Act. The Judge, in the exercise of his jurisdiction, hears certain matters in chambers and certain in Court, and has power to adjourn matters from chambers to court, and *vice versa*. The Judge has also

power to delegate to the Registrar such of the powers vested in him as may be deemed convenient, and the power to deal with certain large classes of matters has been so delegated to the Registrar; any act or decision of the Registrar arising out of this authority is subject to review on application to the Judge. As well as the delegated powers of the Registrar, power is given him by the Act to hear debtors' petitions and make orders for sequestration thereon, to hold public examinations of debtors, to grant certificates of discharge where the application is not opposed, and various other matters; on these matters, too, an appeal lies from the Registrar to the Judge. The Registrar is also the official head of the bankruptcy office, and he and his staff are officers of the Supreme Court.

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When a man is made bankrupt, it is either (A) upon his own petition or (B) upon that of a creditor.

Bankruptcy
on debtor's
own petition.

(A) A debtor's petition may be heard before the Registrar or in chambers; and it is the imperative duty of the Court to make an order for sequestration, if the petition is a proper one; but where the petition is an abuse of the process of the Court, the Court has power to refuse to make an order, and where it appears that the order has been wrongfully made, to rescind it. Should the debtor die, proceedings can continue. Such a petition shall not after presentment be withdrawn without leave of the Judge or Registrar.

Upon the making of a sequestration order the property of the bankrupt vests in the official assignee named in the order, and is divisible among the creditors of the bankrupt in accordance with the provisions of the Act.

Clearly a man might be an undischarged bankrupt, and yet attempt the accumulation of fresh property; there is, therefore, an enactment upon this point—viz., upon the making of an order for the sequestration of the estate

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of an undischarged bankrupt or insolvent, the property of such bankrupt or insolvent possessed by him at the date of the second order of sequestration shall, if the official assignee or trustee appointed under such prior order has not intervened, vest in the official assignee named in the subsequent order, and be divisible in the first instance among the creditors of the bankrupt in the subsequent bankruptcy.

On petition of
creditor.

(B) If it is desired to make a man insolvent, who does not present his own petition, this can be done subject to certain conditions by one or more of his creditors, provided he has committed an act of bankruptcy. There are ten different classes of cases which constitute acts of bankruptcy; they are shortly—

Acts of bank-
ruptcy
more fully,
post p. 338.

- (a) Making an assignment to trustees for the benefit of creditors generally;
- (b) Making a conveyance or gift of property with intent to defeat or delay any creditors;
- (c) Conveyance or transfer which would be void as a fraudulent preference if a sequestration order were in force against him;
- (d) Disappearing or keeping indoors with intent to defeat or delay;
- (e) If execution for a judgment debt has been levied by seizure and sale of his goods, and within five days of such sale the debt be not satisfied by payment;
- (f) If he file a declaration of inability to pay or present a bankruptcy petition against himself;
- (g) Where creditor, having obtained a final judgment against the debtor, has required him, by service upon him of a bankruptcy notice, to pay or settle, and the debtor fails to comply;
- (h) If the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment;

- (i) If the debtor has been adjudged bankrupt by any British Court and not received his discharge, or other corresponding release; CHAP.
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- (j) If, after calling a meeting of his creditors and admitting inability to pay, the debtor has been requested by a majority of those present to file a declaration or present a petition against himself, and has not done so.

If a petitioning creditor is bought off with an undue preference, that is only another act of bankruptcy.

When by an act, which falls into any one of these classes, a debtor brings himself within the law, the creditor's right to petition arises; the principal conditions which qualify this are: that the debt must not be less than £50, but two or more creditors may join; the debt must be due at once, or at a future *certain* date, and must be *liquidated*; the act of bankruptcy relied on must not be more than six months old. When such a petition is made, the debtor may oppose the granting of the order, if he like; but if it be a properly-grounded petition, the sequestration order will follow and official assignee be appointed with same circumstances as in case of the debtor's own petition. It is upon the granting by the Court of the sequestration order that the legal status of bankruptcy arises.

The banker has a great interest in knowing how he stands with regard to a bankrupt, with whom he has dealings, and his official assignee. Two great rules to be borne in mind are: (1) that the property which was the bankrupt's has now become the property of the official assignee; (2) that the relation between banker and customer is that of debtor and creditor, and, if the customer's account be overdrawn, the relationship is of the same nature, though the positions are reversed.

The cases which will most usually present themselves are:—

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- I. Where the bankrupt has a credit, either (a) on current account, or (b) on fixed deposit.
- II. Where bankrupt is in the banker's debt and the debt is either (a) secured, or (b) unsecured.
- III. Where the bank holds for its bankrupt customer, either for safe custody or for collection, negotiable instruments or other property.
- IV. Where the bankrupt is a party to a negotiable instrument, the property of the bank.

Taking these four cases in order, that which presents itself first is very simple.

Bankrupt's
credit
account.

- I. (a) If the bankrupt has a credit balance, this balance must be held at the disposal of the official assignee (the bank will of course satisfy itself that the O.A. has been duly appointed). Therefore, should any further cheques of the bankrupt be presented, these must be refused payment, whether drawn before or after bankruptcy; this will hold even if the cheque be given for a preferential debt, such as wages or salary, for the official assignee has the distribution of the whole estate, both for claims of this kind and ordinary debts.

Bankrupt's
F. D. R.

- (b) If the debtor's bank credit is represented in part or wholly by F.D.R., the receipt, which is the voucher for the transaction, as well as the claim for repayment, will become the property of the official assignee, and on maturity will be payable to him. The receipt, should the bank be holding it on behalf of the bankrupt, must be handed over at once if required.
- II. When the bankrupt is the bank's debtor, the case is not quite so simple; (a) the debtor from whom the bank holds security

may owe the bank a fixed sum, or, as is more often the case, the balance of a fluctuating overdrawn account. As compared with other creditors, banks are not placed in any peculiar position by the Bankruptcy Acts. Any secured creditor has exactly the same rights as the secured banker, and the unsecured banker, be he creditor or debtor, stands on exactly the same footing as other persons who have business relations with the bankrupt.

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Bankrupt in debt to bank, and bank holding security.

(a) A secured creditor means a person holding a mortgage, charge, or lien on the property of the debtor or any part thereof. If the secured creditor petitions, he must either give up his security for the benefit of the creditors generally, in the event of a sequestration order being made, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor, and the official assignee can redeem the security at the creditor's estimate.

What is a secured creditor?

Where he petitions.

The debts which are provable in bankruptcy comprise all debts and liabilities *present* or *future*, *certain* or *contingent*, but do not include demands in the nature of unliquidated damages arising otherwise than by reason of contract, promise, or breach of trust, such as damages which might be recoverable for a tort, and would be of unknown extent until assessed by a jury; nor do they include debts incurred by the bankrupt to a creditor who has notice of an available act of bankruptcy; this last exception is one of considerable interest to bankers.

What debts provable.

It will be seen that debts provable in bankruptcy will include not merely debts in current account, but also liabilities to the bank as guarantor or as party to a

CHAP. bill or promissory note discounted with the bank and not
XXIV. yet due.

Mode of proof Unless a bank holds a realisable security which is sure to produce repayment of the debt, it will require to prove in the bankruptcy. This may be done by delivering or sending through the post in a prepaid letter to the Registrar in Bankruptcy an affidavit verifying the debt. It is well to prove your claim as early as possible, for soon after the sequestration order a first meeting of creditors is held, and the creditors have the right, if they wish it, to assume control of the management of the estate.

To complete the proof in an estate where the claim is in respect of a negotiable instrument or security, such negotiable instrument or security must be produced to the Registrar. The affidavit must also state whether the creditor is or is not a secured creditor.

Validity of Securities.—Whenever a customer who has given securities becomes bankrupt, the unsecured creditors and the official assignee are thrown into a position of natural antagonism to those who claim security over portions of the estate; and in such a case any flaw in the bank's securities is likely to be exposed and insisted upon.

You are already aware that in the case of documents under seal the transaction is in a sense validated by its form and solemnity alone, and that in such cases it is not essential that consideration should have been given. But if no valuable consideration has been given, the conveyance, settlement, or whatever the document may be, is a voluntary one.

Voluntary settlements. Now a voluntary settlement is void against the official assignee or trustee in bankruptcy, if bankruptcy of the settlor occurs within one year after the date of the settlement; and it is void at any time within five years unless the parties benefiting under it can show that

the settlor could have paid his debts without the settled property at the time when the settlement was made.

Banks whose conveyancing is done by good solicitors are not likely to receive a voluntary conveyance to themselves by way of security, but rights depending upon a transaction which would be void when brought under the Bankruptcy Act might easily be pledged to the bank as security. To meet such cases, the Act extends a protection to bona fide transferees for value.

Another class of transaction which is void upon Preferences, bankruptcy, and upon which, therefore, a good security cannot be founded, comprises what are known as preferences. It is enacted (sec. 56, Bankruptcy Act) that every alienation, transfer, mortgage, pledge, &c., of any property, real or personal, made by a person at the time insolvent, or in contemplation of surrendering his estate, or knowing proceedings for sequestration have been commenced against him, or within sixty days before sequestration (*i.e.*, by any person on the verge of bankruptcy), which, whether fraudulent or not, has the effect of preferring any then existing creditor to another, shall be absolutely void. The rights of a bona fide purchaser for value from a creditor of the bankrupt are preserved.

Lastly, we come to the most important class of these invalid transactions. This class comprises any conveyance, gift, transfer, &c., of any property made by anyone with the intent to defeat or delay his creditors, or any of them. Such conveyances have been void ever since a statute of the reign of Elizabeth. To make such a transfer is an act of bankruptcy. Transfers to
defeat or
delay. *post* 339.
Statute 13
Eliz. c. 5.

A consideration of the law that has just been referred to will show that it is possible for a banker, by incautious dealing with an overdrawn customer who is near a state of bankruptcy, to involve his bank in litigation in order to retain questionable securities, and possibly in a measure to discredit it. These consequences

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might be expected from an over-zealous officer, or one prompted by anxiety to cover up his own indiscretion or over-indulgence towards a debtor.

Leaving now on one side these exceptional cases of an invalid security, let us return to a consideration of the normal case where the bank holds a perfectly valid security and is not the petitioning creditor.

There are four courses open to it:—

Bank may
stand on its
security

- (1) The bank may rely upon its security and stand altogether outside the bankruptcy; in this case, naturally, it can have no participation in dividends, nor any voice in the management of the affairs of the debtor. If the security was by way of mortgage, then the equity of redemption, which was part of the property of the debtor, has become vested in the official assignee, who may, if he pleases, redeem.

Or give up
security and
prove for full
amount.

- (2) The bank may hand over the security to the official assignee for the benefit of the estate, and come in and prove for the full amount of its debt as an unsecured creditor. In such a case it has a voice in the management of the property, and shares step for step with the other unsecured creditors in the dividends. Dividends, however, cannot be paid until certain creditors, to whom a special preference has been given by the Act have been paid in full; these are chiefly, clerks, servants, and labourers, for claims for wages, &c., up to £50, earned within the previous six months; and in certain cases the landlord for three months' rent.

Preferential
creditors.

Realise and
prove for
balance.

- (3) The bank may realise its security and prove for the balance, as to which it will be, as regards the balance, in the position of an unsecured creditor.

- (4) Or, the bank may value its security, and prove as an unsecured creditor for the balance.

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When the bank has taken this latter course, the official assignee or trustee may at any time redeem the security for the benefit of the estate on payment to the creditor of the assessed value; or, the official assignee or trustee, if dissatisfied with the valuation, may require a sale; in that case, the secured creditor and official assignee have to agree upon the terms and conditions of sale; if they cannot, the Court will direct the terms.

Value
security and
prove for
balance.

O.A. may
require sale.

When a sale has been completed, the bank's proof of debt in the estate is amended: the amount realised being substituted for the assessed value and the unsecured balance altered correspondingly. Where a sale of this kind takes place by public auction, the creditors, or the official assignee or trustee on behalf of the estate, may bid or purchase.

Power is given to the creditor to at any time, by notice in writing, require the official assignee or trustee to elect whether he will or will not exercise his power of redeeming the security or requiring its realisation, and if the official assignee or trustee does not within three months after receipt of such a notice signify in writing to the creditor his election to exercise the power, he loses the right to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the official assignee or trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount of the valuation. This provision is a very noteworthy one, in that it affords, in case of the debtor's bankruptcy, a simple and inexpensive means of foreclosure. It will be observed the steps are simply: (1) Debtor's bankruptcy; (2) valuation of security by bank with proof in the bankruptcy; (3) notice to elect to the official assignee or trustee; (4) non-election within three months. And that thereupon a statu-

Notice to
O.A. to elect.

Foreclosure
in bank-
ruptcy.

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XXIV.Mistaken
valuation.

tory foreclosure is effected, and the bank's ownership of the secured property becomes perfect.

Special provisions exist allowing, in a case of valuation upon a mistaken basis but in good faith, for a revaluation, provided that it shall be at the cost of the creditor and upon such terms as the Registrar may order.

A creditor who inadvertently put in a proof for the whole amount of his debt without mentioning his security, was allowed to amend his proof; and a mortgagee, who has valued his security and is desirous of amending his valuation and proof, may, in a proper case, obtain leave to do so. A case directly affecting bankers was decided on this part of the law under an Act (5 Vic., No. 17) now repealed, but containing provisions in regard to secured creditors similar to those now in force; there, a bank valued certain securities of an insolvent, which it held, and proved for the residue. A plan of distribution was confirmed and a dividend paid. Afterwards the bank discovered other equitable securities which had been overlooked, and applied to be allowed to revalue the securities held by them. The chief commissioner refused to allow such revaluation, but it was held on appeal there was nothing in the Act to prevent the valuation of an additional security, which was forgotten at the time when the original valuation was made. *Re Cox*, 7 N.S.W.L.R., p. 198.

Where bank
is an
unsecured
creditor.

II. (b) If the banker have an unsecured debt and desires to rank on the estate, he must prove it in the ordinary way. The proof must be made as soon as may be after the making of an order of sequestration. A creditor proves his debt at his own cost, unless the Judge or Registrar otherwise specially orders, by delivering to or sending through the post to the Registrar an affidavit verifying his proof. The affidavit may be made by the creditor himself, or by

Cf. *ante*.
p. 326.

some person authorised. If made by a person authorised, the affidavit must state his authority and means of knowledge.

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The affidavit must contain or refer to a statement of account, showing the particulars of the debt, and must specify the vouchers, if any, by which the debt can be substantiated. The vouchers can at any time be called for.

Proof may be made for a proportionate part

Rent.

of rent, &c., up to the date of the sequestration order, as if the rent or other payment grew due from day to day. As to interest, it is provided that where a debt shall have

Interest.

been proved upon a debtor's estate and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall, for purposes of dividends, be calculated at a rate not exceeding 8 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate shall have been paid in full. If a

creditor has not proved before the declaration of a dividend, he is entitled to be paid out of any money in the hands of the official assignee, but he may not disturb the distribution of any dividend that has been declared.

Disturbing a
declared
dividend.

By section 48 (3) it is provided that in the case of bankrupt partnerships, the joint estate is to be applied in the first instance in payment of joint debts, and the separate estate of each partner to be applied in payment of his separate debts. A surplus of the separate estates is to be dealt with as part of the joint estate. A surplus of the joint estate, if it

Partnerships.

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Debts payable
pari passu.

Where bank
holds
documents.

In case of
lien.

Where bank
interested in
a bill.

exist, is to be treated as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate. Subsection 4 of the same section (48) enacts, subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid *pari passu*.

- III. The case where the bank holds on behalf of its bankrupt customer property belonging to him, whether documents or negotiable instruments or other property, whether for collection or for safe custody, may be dismissed by stating that these must be handed over to the official assignee; to refuse to do so would be a contempt of Court. The assignee will give receipts. But if the document had been subject to a banker's lien, it could be retained as by a secured creditor.
- IV. Where the bankrupt is a party to a negotiable instrument, the property of the bank, this will usually be a discounted bill of exchange, which may have been presented and dishonoured or may be not yet due. The bank would, of course, have recourse upon the indorser for whom it discounted the bill, and would ordinarily charge it back to him; but should it be desired to prove against the maker, this may be done, and it is not necessary for purposes of proof that the bill should have become due or payable at the time of the bankruptcy; if the bill is overdue at time of sequestration, interest may be charged, and if not yet due, interest will be deducted. Naturally the maker of a bill is not the only party who may go insolvent, and the general rule is that the holder of a bill for valuable

consideration may prove for the amount against all parties liable upon it; but where payments have been made on account of the bill, or dividends received from the estate of one of the other parties liable upon it, the holder must deduct such amounts, and can only prove for the amount actually due on the bill at the time of bankruptcy. On the other hand, he may receive a dividend from each of the estates against which he proves until he receives twenty shillings in the pound; and, if after proof he receives a dividend from other parties to the bill, that will not be deducted from his proof, and he will be entitled to receive a dividend on the full amount of the bill until the debt is satisfied.

What Property is Divisible.—The property of the bankrupt divisible among his creditors shall not comprise the following particulars:—

- (1) Property held by the bankrupt on trust for any other person.
- (2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value inclusive of tools and apparel and bedding, not exceeding £20 in the whole.

Besides the above, interests in policies on the life of the bankrupt and annuities and endowments under the Friendly Societies Act are not divisible.

And the creditors may, if they like, allow the bankrupt to retain tools, &c., above the value of £20 and his furniture and personal effects; and other portions of the estate, provided the Judge approves of the resolution.

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But it does include:—

All property which belongs to the bankrupt at the commencement of bankruptcy or is acquired by him before his discharge.

And powers over property which, but for the bankruptcy, might be exercised by the bankrupt for his own benefit.

And all goods being at the commencement of the bankruptcy, or at any time between that time and the date of the order of sequestration in the possession, order, or disposition of the bankrupt, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

Title of O.A. The official assignee's title to the debtor's property, when obtained, dates back to the date of the act of bankruptcy upon which the petition and sequestration order were founded.

Position of
bank after
an act of
bankruptcy.

It is therefore highly dangerous for a bank to honour its customer's cheques after it has had notice of an available act of bankruptcy committed by him; for if he have a current account in credit, it will be thereby depleted, and if a sequestration order be made, the official assignee can claim the amount which stood at the bankrupt's credit at the date when the bank first had notice, and if he be overdrawn the debt would be increased; and the bank would be barred by the statute from proving for that increase, which might thus be wholly lost.

On the other hand, the bank, when it has refused such cheques is not in a very comfortable position; for, if the drawer had as between himself and the bank the right to have the cheque paid, the refusal to pay is a

breach of contract and actionable. In the ordinary case that does not matter much, but in the exceptional case, where the customer's estate is not in fact sequestrated, and he recovers his position and uses his right of action, the position of the bank is a very hard one.

Protection, however, is extended by the Act to bona fide transactions, payments or advances, &c., to or with the bankrupt which take place before the sequestration order, and where the party dealing with the bankrupt had not notice of any available act of bankruptcy.

Protected Transactions.—Certain preferences and certain settlements, &c., which are fraudulent or even so reckless as to have a ring of dishonesty about them, are carefully legislated against by the Bankruptcy Act; but, subject to the provisions of the Act in those cases, it is expressly provided that nothing shall invalidate, in the case of a bankruptcy—

- (1) Any payment by the bankrupt to any of his creditors for or on account of any just debt due at the time of payment;
- (2) Any payment or delivery to the bankrupt;
- (3) Any conveyance or assignment by the bankrupt for valuable consideration;
- (4) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration;
- (5) Any transaction to the extent of any present advance bona fide made by any existing creditors.

Provided that in each of the above cases, first, the payment, conveyance, or transaction, as the case may be, takes place before the date of the sequestration order, and, secondly, that the person with whom the transaction takes place has not notice of any available act of bankruptcy.

It is to be noted in this connection that payment will include the drawing, making, or indorsing of a bill of

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exchange, cheque, or promissory note. In all these cases the party to the transaction in question is protected only upon proof of his ignorance of the act of bankruptcy, so that, should the official assignee dispute the title to property, which had passed between a party and the bankrupt in one of the ways described above, then that party, and not the official assignee, would, in every case, be left with the burden of proof that he had not notice of an available act of bankruptcy. These protected transactions are not to be confounded (by the student) with the preferential debts, consisting of certain claims for wages, already described.

Notice.

What is Notice.—The reader will already have observed that the presence or otherwise of “*notice*” of an act of bankruptcy committed is the most material point in deciding the goodness of a claim in contest with the official assignee. This is the test which is applied to find out the soundness of securities, and which is applied to distinguish a bona fide transaction, entitled to protection from what would otherwise be a preferent transaction tainted with fraud. It will, therefore, be as well to observe that notice may be of two kinds—*actual* and *constructive*.

Actual.

Actual notice is given to a man himself a principal to the transaction.

Constructive.

Constructive notice arises out of the doctrines of law controlling the relations of principal and agent and of master and servant, and the general rule of law is, that notice to the principal is notice to all his agents, at any rate if there be reasonable time for the principal to communicate that notice to his agents before the event which raises the question happens. It will be seen from this, that without great care on the part of a head office, it would be very easy for a branch manager to seriously involve the bank, while acting in perfect good faith. For instance, B, who has an account with the Wilcannia

branch, let us say, arranges to deposit further security for an overdraft which he has there, as well to add security to what he has already given for past advances as to secure a further sum; the transaction is approved by head office, and Wilcannia is instructed that it may be carried out. Soon after, notice of an act of bankruptcy, committed by B in Sydney, reaches A, a responsible officer in head office; he reflects that his own bank is secured, and thinks no more of it. There would really have been time to countermand the instructions given to Wilcannia, but, no such message reaching him, the Wilcannia manager in good faith concludes the business. What happens? The security is useless against the official assignee: valid against everyone else, no doubt, but there would not be much profit in that. To show the importance of this illustration, a case which actually happened to the Bank of England with respect to notice given to the London office and a transaction in good faith by the Gloucester branch may be referred to; there, the transaction was a payment of £1,000 in gold for two of the bank's post bills, but as regards liability for acts of an agent after notice to the principal, the case is exactly on all fours with the one I put about securities. It is said that the doctrine of constructive notice is one which has been carried far enough, and it ought not to be carried one single step further.

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Willis v.
Bank of Eng-
land, 1835,
4 A. & E.
21.

See also
Morris v.
National
Bank.
13 N.S.W.
L.R., 93.

With regard to sufficiency of notice, it is not necessary that there should be notice of some specific act of bankruptcy; general notice that the debtor has committed an act of bankruptcy will be sufficient. Notice of an intention to commit an act of bankruptcy is not sufficient, but if the transaction itself is an act of bankruptcy, the person dealing with the bankrupt must be taken to have notice. Knowledge of facts sufficient to inform a person that an act of bankruptcy has been committed, or from which any impartial person would infer that an act of

Sufficiency of.

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Of "available" act of
bankruptcy.

bankruptcy has been committed, will be held to be notice; but a notice stating circumstances, which may or may not amount to an act of bankruptcy, is insufficient. It is sufficient if the notice comes in any way or from any quarter. It should be observed that the notice required is notice of an act of bankruptcy, not of insolvency; and also that "an available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the sequestration order is made; the act of bankruptcy on which the petition is grounded must have occurred within six months before the presentation of the petition. Therefore, a creditor, who has contracted a debt with the bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of petition, is not precluded from proving in the estate.

Nature of Acts of Bankruptcy.—A list of the various acts which are by the statute declared to be acts of bankruptcy, and upon which a petition can be founded, was given in an abbreviated form at page 322. Briefly it may be said that these acts may be divided into two classes—viz., acts which unmistakably indicate insolvency, and acts which unmistakably indicate fraud. And it will be seen that the list of acts is so comprehensive that any of such a nature must fall into one or other of the categories given, and, therefore, give a creditor immediate rights in bankruptcy against the perpetrator.

To print in full the statutory terms in which the various classes of acts of bankruptcy are set out, and to offer any discussion of them is beyond the scope of this work; but the following short notes should be read in connection with the list at page —.

Assignment
for creditors.

With regard to (a) making an assignment to trustees for the benefit of creditors generally: This has always

been an act of bankruptcy, for the debtor thereby puts it out of his power to carry on his business or obtain credit.

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(b) Making a conveyance or gift of property with intent to defeat or delay any creditors: The important point here is the intent to delay or defeat creditors, and such intent will suffice without any actual delay. The intent is a matter of inference from the facts. It is well established that any disposition of property which is void by the statute of Elizabeth (13 Eliz., c. 5), referred to *ante*, is an act of bankruptcy, but it would seem that conveyances, where the fraudulent motive is not quite so obvious as to vitiate them under that Act, may still be acts of bankruptcy under the Bankruptcy Act; for, under certain conditions, the law infers fraudulent intent upon the ground that the circumstances are such as must of necessity defeat and delay creditors. As, for instance, a conveyance which includes substantially the whole of the debtor's property, or a conveyance, the consideration for which is a past debt and where there is no fair present equivalent; but, on the other hand, a bona fide sale of all a person's property is not an act of bankruptcy; nor is a mortgage or pledge of the whole of a debtor's property, given to secure an existing debt and for further advances, necessarily an act of bankruptcy. Practically, when the assignment or conveyance is of the whole of the debtor's property, and when the effect would be to stop the debtor's trade, the law will infer an intent to defeat or delay creditors, and the party who relies on the assignment by reason of bona fide advances made at the time, will have the burden of proof before he can establish his right; and when the assignment is for part only, or is intended partly to secure an existing debt and partly to secure a further advance, and does not render the debtor insolvent, then, before the assignment can be set aside, the intent to defeat or delay would

Conveyance
to defeat or
delay.

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require to be proved. Of course, as each assignment that comes in a practical way before the Judge in Bankruptcy is attended by circumstances which vary in each case, sometimes being altogether unlike previous cases and sometimes varying with minuteness only, it follows that the decisions which accumulate in a course of years under such a piece of legislation often draw nice distinctions between case and case. Thus it becomes impossible to lay down the law very minutely as it might apply to hypothetical cases; only when all the attendant circumstances are known can it be said with certainty whether a conveyance is questionable or sound: that is, with regard to transactions which are on the border line between honesty and fraud. Broadly, the business man and the practical banker know that if they act with thorough bona fides and with scrupulous care as to notice, their securities can rarely if ever be displaced.

Going away
or hiding.

(d) When the debtor disappears from the jurisdiction or otherwise absents himself or keeps house with intent to defeat or delay his creditors: Here, again, the gist of the offence is the intent, and if the purpose be proper, the act will not be an act of bankruptcy, although the creditors are delayed; but if the *necessary consequence* of the debtor's act be to delay creditors, that will be an act of bankruptcy, though it were not his principal motive, for a man is presumed to intend the necessary consequences of his own act. Where an Englishman remained out of England at his own permanent residence abroad, it was held that intent to defeat or delay creditors could not be imputed to him for that circumstance alone, and that failure to keep an appointment with a creditor, made previous to his leaving, was not sufficient evidence of such intent. Absence after dishonour of a promissory note, and without making provision for payment of another promissory note falling due during absence, is evidence

of intent; but where a debtor removed to another residence on the day a bill of exchange fell due, but was seen in the streets, it was held that no act of bankruptcy had been committed.

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(e) Where a judgment debt is not satisfied five days after execution levied by seizure and sale of goods: Under this subsection the debtor has five days after the sale in which to satisfy the debt by payment, and if he does so then he commits no act of bankruptcy; *e.g.*, execution levied against A by seizure and sale for £200. The sale realises £150. Within five days A pays his creditor £50. No act of bankruptcy has been committed.

Not satisf-
ying judg-
ment debt.

(f) Is the clause which debtor uses to found his own petition upon, and needs no explanation.

After service
of bank-
ruptcy notice.

(g) Where a creditor, having obtained a final judgment against his debtor, has required him, by service upon him of a bankruptcy notice, to pay or settle, and the debtor fails to do so: Where a debtor commits any act of bankruptcy under this subsection, any creditor may avail himself of such act for the purpose of presenting a petition, and the right to present a petition is not limited to that creditor by whom the notice was served. This provision is one of great importance. In the ordinary course of affairs it may very often be the only way open to a creditor who wishes to drive a debtor into bankruptcy, for a creditor can always sue and obtain judgment for his debt, and this will be necessary if no act of bankruptcy has been committed within six months or come under his notice.

(h) If the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment: There have been many decisions on this point. Briefly, their effect is to make it clear that a verbal notice of suspension is a good act of bankruptcy, but it must be something formal and deliberate, with a clear consciousness by the debtor that he is "giv-

Notice sus-
pending
payment.

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ing notice," not mere casual talk. In considering the question whether a statement made by a debtor to any of his creditors amounts to a notice within the subsection, it is necessary in each case to estimate the reasonable construction which those persons who receive such statement of the debtor would, under the circumstances of the debtor's case, have a right to assume to be his meaning as to what he intended to do with respect to paying or suspending payment. Where the language of the debtor can only lead his creditors to infer that if an offer of composition made by him is not accepted suspension is the only alternative, such statement will amount to a notice within the subsection.

The remaining acts of bankruptcy, (i) and (j), do not call for comment.

The Powers and Duties of the Official Assignee.—The official assignee, or trustee, may independently of the committee of inspection (1) sell all or any part of the property of the bankrupt (including the good will of his business, if any, and the book debts due or growing due to the bankrupt) by public auction, and has power to transfer the whole thereof to any person or company or to sell the same in parcels; (2) give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof; (3) prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt; (4) exercise any powers, the capacity to exercise which is vested in the official assignee or trustee under the Act, and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of the Act; (5) deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have done.

With the permission of the committee of inspection, if there be one, and if not, with the permission of the Judge or Registrar, he may carry on the business of the bankrupt so far as may be necessary for a beneficial winding up; bring or defend actions; sell for credit or by private sale; mortgage or pledge property; divide among the creditors property which cannot be readily or advantageously sold; compromise provable debts or claims against the bankrupt's property, &c., &c.

It is the duty of the official assignee, as soon as can be done after making of the sequestration order, to take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery. For the purpose of acquiring and retaining the property of the bankrupt, he is to be in the same position as if he were a receiver appointed by the Supreme Court, and the Judge may, on his application, enforce such acquisition or retention accordingly. Where any part of the property of the bankrupt is subject to onerous conditions or obligations, the official assignee may, within three months after the date of sequestration order, disclaim the property. This power of disclaimer may be exercised, notwithstanding that he has endeavoured to sell, or has taken possession of the property, or done any act of ownership in relation to it. When this power is exercised, it operates to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and the official assignee in respect of the property disclaimed; but the rights of other parties are not to be affected.

Among the formal duties of the assignee are—the obligation to furnish accounts of his receipts and expenses in each quarter of the year to the Registrar for audit; to furnish, when required by any creditor to do so, a list of the creditors, showing the amount of the debt due to each; he is also required to keep a record book and a

CHAP.
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cash book, and must submit such books, together with any requisite books and vouchers, to the Judge or Registrar when required. Finally, the official assignee presents his report, *post*, p. 347.

Further, the official assignee has the power of commencing proceedings under section 30 for discovery of the debtor's property.

Control by
judge.

The Act gives the Judge in Bankruptcy a very full power of control over the official assignee. Thus, by section 93, the Judge shall take cognizance of the conduct of assignees and trustees, and in the event of any assignee or trustee not faithfully performing his duties and duly observing all the requirements imposed on him by statute, rules, or otherwise with respect to the performance of his duties, or omitting to use reasonable diligence with respect to their performance, or in the event of any complaint being made to the Judge by any creditor in regard thereto, the Judge shall inquire into the matter, and take such action thereon as may be deemed expedient. So, too, the Judge may at any time require an assignee to answer any inquiries he may make in regard to a bankruptcy upon which the assignee is engaged, and examine him upon oath about the matter; he may also direct an investigation to be made of the books and vouchers of the assignee or trustee by the Colonial Treasurer or Registrar.

Powers of the Court in the matter of the Discovery of the Debtor's Property.—Section 30 gives the Judge power, on the application of the official assignee, to summon before him the bankrupt or his wife, or any person known or suspected to have in his possession any of the estate or effects of the bankrupt, or indebted to the bankrupt, or whom the Judge thinks capable of giving useful information in the bankruptcy; and the Judge can require any such person to produce any documents in his custody or power relating to the bankrupt, his

property or dealings. The Judge can have any person refusing to come, when so ordered, apprehended upon warrant and brought up for examination. When before the Court for examination, the person thus brought up may be examined by the Judge, assignee, or any creditor, and if he admit owing any debt or having any of the property of the bankrupt, the Judge may order him to pay the debt in such manner as seems to the Judge expedient, or to deliver to the official assignee the property, or any part of it, on such terms as the Judge thinks just. The power to make these orders has been delegated to the Registrar.

The bankrupt or any person undergoing examination under the section just quoted may, if he refuse to be sworn, or to answer any question, or to hand over any book, document, &c., be committed to prison, to stay there till he do the thing required, or be discharged by the Judge or Court. And if any person while under examination is guilty of prevarication or evasion, or indecent conduct, the Judge or Registrar may convict him to prison for any term not exceeding fourteen days.

It will be easily seen that the procedure given by those provisions provides an apt way to force disclosure of any property or goods which may have been laid by by a dishonest bankrupt, and should his friends back him up they can be put to such inconvenience as should eventually compel straightforward conduct.

The matter in this chapter relates to the bankruptcy of individuals. By section 114 of the statute a sequestration order cannot be made against any corporation, or against any partnership or association or company registered under the Companies Act; but a procedure for winding-up is given by that Act. Limited
Companies.

This notice of the bankruptcy laws would be incom-

CHAP.
XXIV.Punishment
of bankrupt.

plete if it did not make some mention of the methods of punishing the bankrupt.

In the first place, then, the bankrupt continues in a state of bankruptcy from the date of the sequestration order until he gets his certificate of discharge. If without his discharge he commences to accumulate fresh property, this will belong to the official assignee. Moreover, during bankruptcy, certain duties, and penalties for their neglect or infringement, attach to the bankrupt. Thus, any bankrupt who dishonestly conceals his affairs or refuses to deliver up, or falsifies or mutilates his books, or conceals his assets, or allows false debts to be proved, or makes any false representation to his creditors, renders himself liable to three years' imprisonment with hard labour. The same penalty is incurred by bankrupts who have been guilty of improper conduct within four months of their bankruptcy, with intent to defraud their creditors or to conceal their affairs. So it is a misdemeanour if a person, who is within four months made bankrupt, does any of the following things, viz.:—

- (1) Incurs fictitious loans or expenses to account for failure;
- (2) Obtains property in the ordinary way of trade, for which he has not paid, by means of any false representation or under pretence of carrying on business;
- (3) Pledges or disposes of any property, otherwise than in the ordinary way of trade, which he has obtained on credit and not paid for;
- (4) Departs or makes preparations to depart from the State with any property to the value of £20 which would have been available to his creditors.

A bankrupt is also liable to two years' imprisonment with hard labour, who—

- (1) Obtains credit by any false representation or fraud; CHAP.
XXIV.
- (2) Parts with any of his property with intent to defraud any of his creditors;
- (3) Has fraudulently concealed or removed any part of his property after or within two months before the date of any unsatisfied judgment against him.

Any bankrupt who, in the opinion of a Judge, has been guilty of a misdemeanour may be summarily committed by the Judge to take his trial.

Another duty of the official assignee is to present his report. When a bankrupt wishes to get his discharge, he advertises, stating his intention to apply on a fixed day, and gives fourteen days' notice to the official assignee, who, in his turn, files his report in Court at least four days before the day fixed, when the bankrupt, if he takes exception to the report, may file an affidavit in reply. The purpose of the Act in giving the official assignee or trustee the power to make a report, and making it *prima facie* evidence of the truth of the facts contained in it, was in order that the Court might not be forced, as it had been before, to rely upon the view of the majority of the creditors. The report should be drawn with great care, and should state the grounds of the conclusions come to explicitly, so that the Judge may be able to determine satisfactorily what punishment, if any, should be awarded. Facts which have come to the knowledge of the official assignee, and which the Court should bear in mind in granting a certificate, should be set out in the report by the official assignee. Discharge of
bankrupt.

The Judge has an unlimited discretion to grant or refuse a bankrupt his discharge, or to suspend the discharge, or grant a conditional discharge, except, in cases in which that discretion is expressly limited by the proviso, that where the Judge has granted a release of the

CHAP.
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bankrupt's estate under section 35 (payment in full) the bankrupt may forthwith apply for a certificate, and by the proviso that the Judge shall refuse the discharge in the case of certain proved misdemeanours under the Act.

In the exercise of this discretion the Judge may take into consideration any conduct or affairs of the bankrupt relevant to the bankruptcy, and it is his duty to have regard, not to the interests of the bankrupt alone or of the creditors alone, but also to the interest of the public and of commercial morality.

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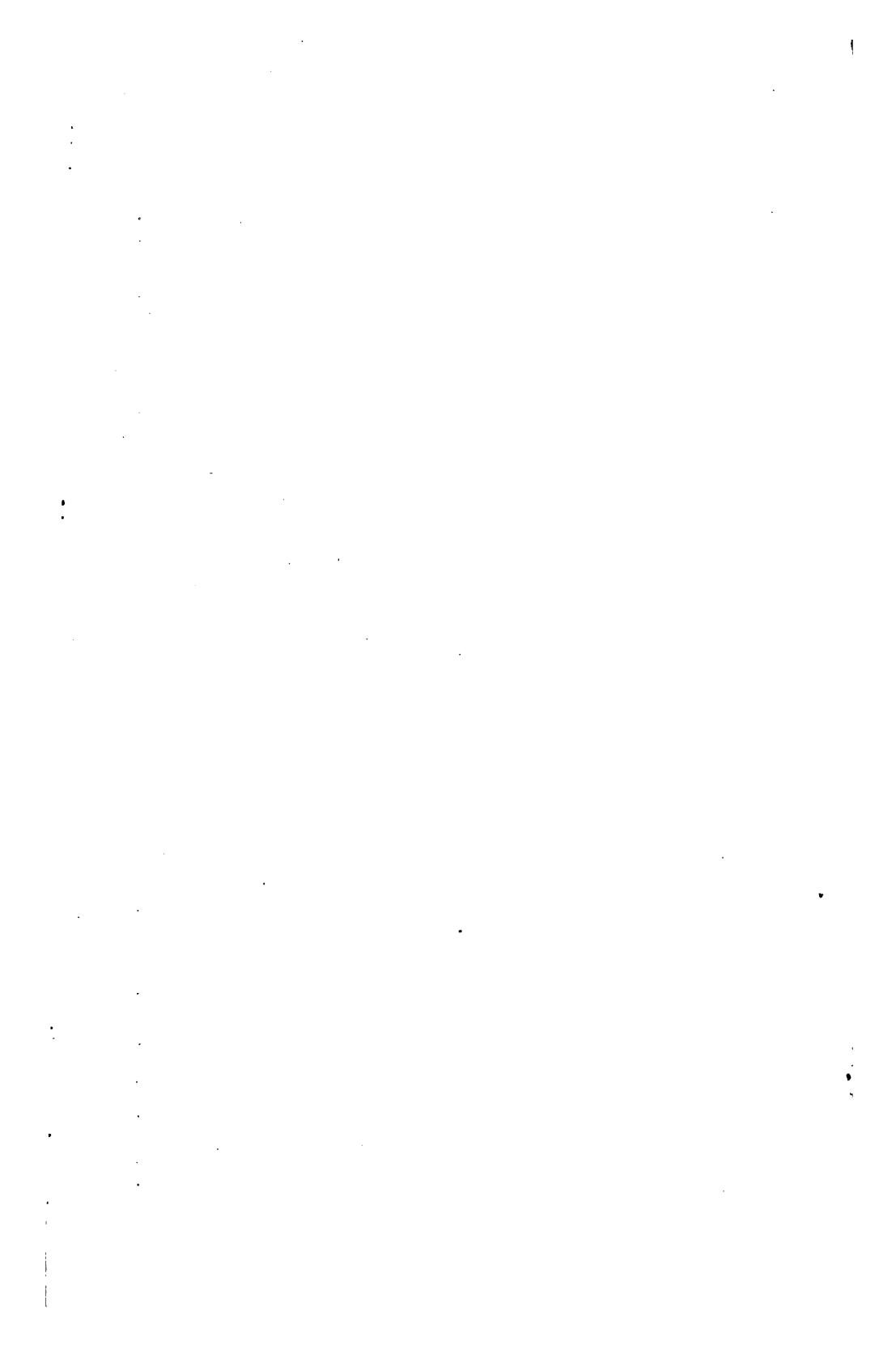
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